

**BEFORE THE LAND USE HEARINGS EXAMINER  
FOR CLARK COUNTY, WASHINGTON**

In the matter of a Type III development application and environmental review for a rezone of approximately 100 acres of Agriculture 20 (AG-20) land to apply the Surface Mining Combining District (AG-20-S), site plan review, habitat, wetland and shoreline permit approvals for an expansion of an existing surface mining operation onto 178 acres of an approximately 292-acre site in unincorporated Clark County, Washington.

**FINAL ORDER**

**Storedahl – Daybreak Mine**

**REZ98-011; CUP2004-00002;  
SPR98-034; SHL99-001;  
SHL2000-00009; HCG98-179;  
WTP98-038; SE98-098**

**I. Summary:**

This Order is the decision of the Clark County Land Use Hearings Examiner approving with conditions this application to rezone approximately 100 acres of Agriculture 20 (AG-20) land to apply the Surface Mining Combining District (AG-20-S), site plan review, habitat, wetland and shoreline permit approvals for the expansion of an existing surface mining operation onto 178 acres of an approximately 292-acre site (REZ98-011; CUP2004-00002; SPR98-034; SHL99-001; SHL2000-00009; HCG98-179; WTP98-038; SE98-098).

**II. Introduction to the Property and Application:**

**Owner/Applicant**..... J.L. Storedahl & Sons, Inc.  
2233 Talley Way  
Kelso, WA 98626

**Contact**..... Skip Urling  
Ecological Land Services, Inc.  
1157 3<sup>rd</sup> Avenue, Suite 220  
Longview, WA 98632

**Property** ..... Legal Description: Parcel Numbers 212114, 212163, 214676, 225005, 225047, 225053, 225054, 225167, 225169, 225173.  
Street Address: 27140 NE 61<sup>st</sup> Avenue, Battle Ground, WA.

**Applicable Laws**..... RCW 90.58, WAC 173-27 and Clark County Code (CCC) Chapters 12.05 (Transportation), 12.40 (Concurrency), 13.25 (Stormwater Drainage), 13.27 (Erosion Control), 13.39 (Wetlands Protection), 13.51 (Habitat Conservation), 15.12 (Fire Code), 18.302 (Agriculture and Forest Districts), 18.329 (Surface Mining Overlay), 18.402A (Site Plan Review), 18.503 (Rezone), 20.50 (SEPA), 40.520 (Conditional Use Permits), Clark county Shoreline Master Program.

## Table of Contents

I.	Summary.....	1
II.	Introduction to the Property and Application.....	1
	A. The subject property .....	3
	B. The consolidated permit applications .....	3
	1. Rezone .....	3
	2. Site Plan Review for uses within the Surface Mining Overlay .....	4
	3. Conditional Use Permit.....	4
	4. Shoreline Permit .....	4
	5. Wetland and Habitat Permits.....	5
	C. History of extraction and processing at the Daybreak Mine site.....	5
	D. The applicant's Nonconforming Use Right .....	6
	E. Proposed activities that necessitate local land use approval .....	7
III.	Summary of the Local Proceeding and the Record .....	8
	A. April 29, 2004 Hearing.....	9
	B. May 13, 2004 Hearing .....	9
	C. June 1, 2004 Hearing .....	11
IV.	Findings.....	13
	A. Land Use Issues Raised by Opponents .....	14
	1. Impacts to protected fish species and their habitat .....	14
	2. Effect of avulsion on fish populations .....	15
	3. Habitat improvement or loss from avulsion .....	17
	4. Risk of avulsion occurring.....	18
	5. Water quality impacts from the mine operation .....	20
	B. Approval Criteria.....	21
	1. Rezone Application.....	21
	2. Site Plan Review .....	32
	3. Conditional Use Permit.....	35
	4. Shoreline Permit .....	36
	5. Wetland & Other Permit Issues .....	49
V.	SEPA Determination and Appeals .....	57
	A. Friends of the East Fork appeals (Exs. 287 & 344).....	58
	B. Scott Rose appeals (Exs. 288 & 345).....	73
VI.	Decision and Conditions .....	77

**A. The subject property:** The site of this application is the Daybreak Mine – a surface mine extracting alluvial sand and gravel deposits adjacent to the East Fork of the Lewis River (“EFLR”) extending from approximately river mile (“RM”) 7.2 to 9.0. The northwestern edge of the site is bounded by Dean Creek – a perennial tributary to the EFLR that is hydrologically connected to the detention ponds that are on the mine site within the floodplain. The EFLR is home to, and the breeding site for, at least 9 fish species listed as threatened or endangered under the Federal Endangered Species Act (“ESA”).<sup>1</sup> ESA Section 9 prohibits the “taking” of a listed species or the significant modification of a listed species’ critical habitat. NOAA Fisheries and the U.S. Fish & Wildlife Service (collectively the “Services”) have regulatory jurisdiction for these species, and ESA Section 7 requires consultation with the Services prior to any federal governmental action that could jeopardize a federally listed species. Because the proposal, as a whole, stands to “take” listed species, the applicant (“Storedahl”) sought through separate applications under ESA Section 10(a) an incidental take permit (“ITP”) that would provide the applicant with coverage for a potential violation of the Section 9 take prohibition. To obtain an ITP, an applicant must consult with the Services and obtain their approval of a habitat conservation plan (“HCP”) that demonstrates that the project as a whole will not appreciably reduce the likelihood of the survival and recovery of the listed species in the wild. That “no jeopardy” conclusion is then memorialized by the Services in a favorable biological opinion (“BO”). The entire federal permitting process is subject to environmental review and comment under the National Environmental Policy Act (“NEPA”), which in this case involved an environmental impact statement (“EIS”).

**B. The consolidated permit applications:** The present development proposal includes several discrete land use and other permit applications for the expansion of mining and processing operations at the Daybreak Mine site. In addition, Storedahl has proposed an HCP (Exs. 276 & 394) as a means of obtaining a favorable biological opinion (Ex. 414) and approval of an ITP (Exs. 410 & 415) from the Services. Implementation of the approved HCP requires the applicant to perform certain conservation and monitoring measures that are subject to County land use review and permitting authority, in addition to the work associated with the mine expansion. Collectively, all of this work was the subject of a final Environmental Impact Statement (FEIS) (Exs. 277 & 278) and now requires the following specific local approvals:

**1. Rezone:** This application proposes to apply the Surface Mining Overlay designation to approximately 100 acres of the site that is currently zoned AG-20 (Ex. 389) to expand the extraction area into the site’s uplands. Application of this overlay will expand the range of allowed uses to include surface mining extraction and processing. The area proposed for the overlay is outside of the 100-year floodplain of the EFLR. The requirements and approval criteria for application of the Surface Mining Overlay are at CCC 18.503.060(1) through (4).<sup>2</sup> Storedahl’s rezone application is Exhibit 389.

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<sup>1</sup> The 8 listed fish species are steelhead, bull trout, chum salmon, Chinook salmon, coho salmon, coastal cutthroat trout, pacific lamprey and river lamprey.

<sup>2</sup> The rezone application was vested on February 17, 1998 under a prior version of the CCC. Under the Unified Development Code, the rezone criteria are at CCC 40.560.020(H).

2. Site Plan Review for uses within the Surface Mining Overlay: For areas approved for surface mining through application of the Surface Mining Overlay district designation (Ex. 389), site plan approval is required for the new mining activities. The requirements and approval criteria required for site plan approval are at CCC 18.402A.040 (approval standards), 18.402A.050 (landscaping and screening design and approval standards), 18.402A.060 (parking and loading standards), 18.402A.070 (access and circulation standards), 18.402A.080 (standards for storage of solid waste and recyclable materials), 18.402A.090 (outdoor area standards), 18.402A.100 (crime prevention and safety guidelines), and 18.402A.120 (bicycle guidelines).<sup>3</sup> Storedahl's original and revised site plan applications are Exhibits 61 and 279 respectively.

3. Conditional Use Permit: Part of the processing proposed for the site is rock crushing, and this particular operation requires a CUP. The CUP requirements and approval criteria are at CCC 18.404.060.<sup>4</sup> The Examiner recognizes that pursuant to the County's 1996 nonconforming use determination (Ex. 40), a certain amount of rock crushing is allowed as of right. However, as explained below, this application proposes to alter and expand upon that nonconforming use, and therefore the entire proposed operation must be brought in to conformance with County land use and development regulations. One aspect of the entire operation – rock crushing – requires a CUP, which Storedahl has applied for (Ex. 332).

4. Shoreline Permit: Certain aspects of the processing operation as well as mitigation and monitoring proposed under the HCP are proposed within the jurisdictional limits of the County's Shoreline Master Program. The shoreline permit requirements and approval criteria are in WAC 173-27-140 and 173-27-160 and pertain to activities within 200 feet of the EFLR. No mining is proposed within the shoreline permit area or within 75 feet of Dean Creek.<sup>5</sup> The specific "operations" for which shoreline permit approval is sought include:<sup>6</sup>

- Temporary stockpiling of sediments to be used for reclamation are proposed to be located in the 100-year floodplain;
- Portions of the conveyor which cross the 100-year floodplain to transport rock from the active excavation site to the processing area;

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<sup>3</sup> The site plan review application was vested on September 15, 1998 under a prior version of the CCC. Under the Unified Development Code, the site plan review criteria and related design standards are at CCC 40.502.040(E), 40.320.010, 40.340.010, 40.340.020, 40.360, 40.260.150, 40.330.010 and 40.350.010(D).

<sup>4</sup> The CUP application was vested on February 26, 2004 under a prior version of the CCC. Under the Unified Development Code, the CUP criteria are at CCC 40.520.030(E)(2) with authorization to impose conditions or limitation on the 8 issues described in CCC 40.520.030(E)(1).

<sup>5</sup> Dean Creek does not appear to be subject to the County's shoreline permit requirements. Nonetheless, mining is not proposed within 75 feet of the top of bank of this creek.

<sup>6</sup> As originally proposed, the storage shed, storage tank, metering compartment and mixing tank for the water quality additives (flocculants and coagulants) were to be within the 100-year floodplain adjacent to Pond 1. Pursuant to the HCP Addendum (Ex. 394), however, these elements will be removed from the shorelines jurisdictional area before operations begin.

- The pump and float system located near the edge of pond 2 to provide water to the sand classifier;
- Portions of the sand and gravel product stockpiles are located within the 100-year floodplain and the 200-foot shoreline management area;
- The scale house/office, truck scale and maintenance building are within the 200-foot shoreline management area;
- Portions of the site access road (Storedahl Pit Road) are within the 200-foot shoreline management area;
- Some temporary noise berms and stockpiles are within the 100-year floodplain;
- Portions of the aggregate conveyor system are within the 100-year floodplain; and,
- Fill is proposed for the existing ponds, located within the 100-year floodplain, as part of reclamation of those sites.

Portions of the site are located within the mapped 100-year floodplain (Ex. 277, Fig 3-5) as shown by the Federal Insurance Rate Map (FIRM) Panel # 530024 0178 and revised by the Federal Emergency Management Agency (FEMA) in a Letter of Map Revision on June 16, 1999 (Exs. 137 & 157). The project is within the 200-foot riparian Habitat Conservation Zone of Dean Creek and outside the HCZ of the EFLR. However, the project is partially within the Shorelines area of the East Fork Lewis River, regulated by the Shoreline Management Act. See Ex. 10.

No mining is proposed within the 100-year floodplain. According to the proposal and the HCP, all active operations, including stockpiles, will be removed from the 100-year floodplain at the completion of mining operations.<sup>7</sup> Storedahl has submitted two shoreline permit applications: one for the portion of the rock conveyor system that crosses the 100-year floodplain and the second for portions of the processing operation within the shoreline area. The two shoreline applications are Exhibits 124 & 181, and the issues in both are collectively discussed in Exhibit 484.

**5. Wetland and Habitat Permits:** There are two Category 4 wetlands (Wetlands B & D) and two Category 3 wetlands (Wetlands A & C), and attendant buffers on the site (Ex. 279, App B). The mining operation will destroy one of the Category 4 wetlands (Wetland B) that is 0.25 acres in size. The HCP proposes, however, to create approximately 82 acres of new forested and emergent wetlands. The approval and mitigation for wetland fills is governed by the regulations and criteria in CCC chapter 13.36 (former code) and CCC chapter 40.450 (current code).

There are two riparian Habitat Conservation Zones (HCZ) on the property associated with Dean Creek and the EFLR. The proposed mining expansion is located outside of the East Fork Lewis River HCZ, but two temporary noise berms and a settling pond are proposed to be within the 200-foot riparian HCZ of Dean Creek. These aspects of the project within the HCZ require a habitat permit.

**C. History of extraction and processing at the Daybreak Mine site:** The specific land use approvals sought in these consolidated applications relate to the

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<sup>7</sup> Shoreline permits are initially reviewed and decided by the Shoreline Management Review Committee. In this case, the Shoreline Management Review Committee approved the requested permit on April 21, 2004 (Ex. 407).

existing Daybreak Mine, currently owned and operated by the applicant. The current proposal must be considered in light of the existing mining and processing operations that have existed, in at least some form, since at least 1968. The site has operated under a Washington Department of Natural Resource (DNR) Surface Mining Permit since 1971 (Ex. 30). Between 1971 and 1987, approximately 65 acres was disturbed by two different mine operators. J.L. Storedahl & Sons, Inc. (Storedahl) acquired the property in 1987 and began mining and processing on the site without benefit of local permits. Between 1987 and 1995, Storedahl mined on approximately 15 acres of the site, but since that time, no active gravel extraction has occurred at the Daybreak Mine. Since 1995, Storedahl has used the site for processing, and has apparently imported some material for that purpose. The old excavation pits, however, remain as a series of sequential settling ponds for the processing operation. There are 5 ponds with depths ranging from less than 8 feet to more than 20 feet. See figure 3-10 of Ex. 276. These ponds, processing operations, and at least some level of extraction are all part of the baseline existing conditions on the site claimed by the applicant.

The existing processing area occupies approximately 23 acres in the southwest portion of the site and includes Storedahl Pit Road, storage areas for excavation equipment, aggregate processing equipment (portable crushers and screening plants, pumps, classifier, process water treatment system, electrical systems and transformers, etc.), stockpiles of raw material and processed sand and gravel, fuel storage, parking areas, temporary haul roads, an office/scalehouse, a portable scale, and maintenance shop.

**D. The applicant's Nonconforming Use Right:** An important legal issue is the applicant's assumed right to continue its historical mining and processing activities, which it asserts are part of a protected nonconforming use right. The precise nature and extent of this nonconforming use right was certificated in 1996 by a land use decision rendered by the County Planning Director (Ex. 40). The decision apparently was appealed by opponents, and the superior court action was subsequently stayed. According to testimony by both the applicant and the opponents, and as confirmed by the County Prosecuting Attorney, the ultimate status of the County's nonconforming use determination is not final, at least to the extent that the legal challenge to the nonconforming use determination could still be reactivated.

The merits of the applicant's nonconforming use claim are not before the Examiner in this consolidated application to expand and change the operation, nor are the opponents' assumptions and assertions that the nonconforming use right does not exist. The Examiner notes, however, that the applicant's nonconforming use claim forms the basis for the "no action" alternative in the final environmental impact statement (Ex. 277, "FEIS"). In other words, the applicant claims and assumes that in the absence of any federal governmental action to approve the U.S. Army Corps of Engineers ("USACE") permit or the habitat conservation plan ("HCP"), Storedahl can continue material processing at the site and some amount of sand and gravel extraction. This is significant issue in this proceeding, because many of the criteria, including the environmental analysis for the HCP, assume a particular base level of operation. If that base level is a zero operation, then the extraction and processing contemplated in this proposal would be a significant increase over the base level. On the other hand, if the base level is assumed to be the applicant's claimed nonconforming use, then the impact of the extraction and process contemplated here would likely be a net reduction in environmental impact. The later assumption, *i.e.*, that the applicant is entitled to its

claimed nonconforming use described in Exhibit 40, appears to have driven the FEIS analysis and the final decision approving the HCP.

The Examiner has not been asked to decide independently in this proceeding the validity of the applicant's nonconforming use claim, nor will he do so. The nature and extent of the applicant's nonconforming use claim was documented in detail by the County in 1996 (Ex. 40), and the Examiner takes at face value the findings of fact and conclusions of law stated in the County's nonconforming use determination. That decision, while still under appeal in superior court, was final at the local level, and the parties who appealed that decision apparently did not seek or obtain a stay of the County's 1996 decision. The validity of that decision was apparently assumed during the NEPA process attendant to the USACE permit and the HCP (Exs. 276 & 394) and ITP (Exs. 410 & 415) approved by NOAA Fisheries along with a favorable BO (Exs. 414 & 439). The Examiner is not in a position to second-guess the County Planning Director, nor, in light of the still-pending superior court action, would that be a proper role for the Examiner. Consequently, the Examiner takes at face value the apparent validity of the County's 1996 nonconforming use determination (Ex. 40) that establishes the base level of operation allowed at the Daybreak Mine as of right. In that light, the current set of applications constitute an alteration of that use allowed by right.<sup>8</sup>

Not only does the Examiner accept the validity of the County's 1996 nonconforming use determination, but he also acknowledges the significance of relevant Washington appellate cases decided since then, *e.g.*, *University Place v. McGuire*, 144 Wn.2d 640, 30 P.3d 453 (2001) and *Rhod-a-zalea & 35<sup>th</sup> Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998). *McGuire* confirms Washington's acceptance of the doctrine of diminishing resources which allows a nonconforming aggregate mine to extract the entire subsurface resource over time and does not limit a nonconforming mine to the open pit area that existed at the time the mine became nonconforming. *Rhod-a-zalea* stands for the proposition that local governments in Washington cannot compel the cessation of a nonconforming use without just compensation. Collectively, these cases confirm that the base case (the so-called no action alternative) approximates the current extracting and processing operation. This is essentially the level of mining – the nature and extent of the nonconforming use – that is allowed without any further governmental action or permits.

**E. Proposed activities that necessitate local land use approval:** The applicant proposes in this proceeding to commence (or renew) extraction activities at the mine site, but this time within a 178-acre upland portion of the 292-acre site (the "expansion area"), away from the EFLR and out of the floodplain. Figures 2-2 and 2-3 of Exhibit 277 show the sequential mining and final site plan, respectively. Only approximately 100 acres of the 178-acre expansion area would be subject to mining. The relevant question in these consolidated applications is whether the existing mining operation should be allowed to relocate to the uplands and eventually reclaim and

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<sup>8</sup> The nature and extent of the nonconforming use recognized by the County in 1996, and acknowledged by the Examiner in this proceeding is limited to activities regulated by the County pursuant to its zoning ordinance and comprehensive plan pursuant to the Growth Management Act ("GMA"). This is not to say, however, that the applicant is exempt from obtaining any additional permits or approvals required by state law for certain aspects of the proposed operation, *e.g.*, a shoreline permit.

rehabilitate the riparian habitat that is currently in an exceedingly degraded condition and a threat to listed fish species and their habitat. In light of the lawful nonconforming use acknowledged in the preceding section (Ex. 40), the question is not whether a new mining operation should be allowed to begin on a virgin site. It is clear that a new mining operation on a virgin site adjacent to the EFLR could not meet the approval criteria, and would be denied.

The mining operation will involve removal of the surface overburden, largely topsoil that will be stockpiled on site and reserved for reclamation by sequentially using bulldozers or pan scrapers before commercially recoverable deposits are excavated. Excavators will be used exclusively in and around the ¼-acre wetland located in the northwest portion of the site. Overburden would be segregated into topsoil and other material. Overburden materials, including topsoil, will be stockpiled for future reclamation activity and for constructing acoustical and visual buffers during mining. Marketable aggregate will be excavated using a track hoe, dragline, or both, and transported to the on-site processing area by truck or conveyor.

Additionally, the applicant proposes expanded processing in connection to the material extracted on site and imported from off-site. The location for processing is the current processing site in the southeast corner of the property. The ability to conduct this processing is the subject of the CUP request and includes crushing, washing and sorting the raw material into sand and gravel of varying sizes and grades. Material will be stockpiled at the on-site processing area for subsequent sale and transport to market.

Finally, full implementation of the proposal requires a wetland permit and a habitat permit. Wetland permit approval is required because Phase 6 of the mining plan proposes the filling of a 0.25-acre Category 4 wetland. By way of mitigation, the applicant proposes to create approximately 82 acres of forested and emergent wetlands under the HCP (Ex. 276). Habitat permit approval is required because two temporary noise attenuation berms (Ex. 277, Fig 3-28) and a temporary washwater sediment stockpiling area (Ex. 181, Fig 3) are proposed to be constructed within the 100-year floodplain of the EFLR and as part of mining. The applicant has provided any analysis showing that these temporary structures will not impair floodplain functions (Ex. 483). Additionally, the mining project proposes mining activity within the 200-foot riparian habitat conservation zone associated with Dean Creek. The applicant has provided a reclamation proposal as part of the HCP that will restore the biological and physical riparian functions of Dean Creek to a condition better than current. The applicant has also provided evidence and analysis showing that the mining operations will not impair these functions.

### **III. Summary of the Local Proceeding and the Record:**

Land use permit applications are judged against the approval criteria in effect at the time a complete application is filed. RCW 58.17.033. If a pre-application conference is required, the application shall vest even earlier, *i.e.*, it will contingently vest on the date the fully complete pre-application request is filed. To contingently vest in this manner, the applicant must then submit a fully complete application for substantially the same proposal within 180 days of when the county issues its pre-application conference report.



This case involves multiple applications submitted over approximately seven years. Three pre-application conferences were held related to these cases on December 18, 1997 (PAC 97-118); June 2, 1998 (PAC 98-072); and, September 14, 2000 (PAC 2000-00172). PAC 97-118 and PAC 98-072 were determined to not contingently vest, and therefore those applications vested on their fully complete dates. PAC 2000-00172 was determined to be contingently vested as of August 21, 2000 (the date the fully complete pre-application was submitted). From this, staff determined, and the applicant did not object to, the following vesting dates:

REZ 98-011 .....	February 17, 1998
SPR 98-034 & WTP 98-038 .....	September 15, 1998
HCG 98-179 .....	December 23, 1998
SHR 99-001.....	February 10, 1999
SHL 2000-00009 .....	August 21, 2000
CUP 2004-00002.....	February 26, 2004

The applicant then requested that these consolidated applications be placed on hold while it pursued the federal process with the Services. Once that was nearly complete, and the draft EIS was being circulated, the applicant requested the reactivation of the land use process. Notice of the applications and public hearing were mailed to the applicant, the Daybreak Neighborhood Association and property owners within 500 feet of the perimeter of the property, as well as any others who had requested notice or otherwise were parties of record on December 31, 2003, January 22, 2004 (Ex. 298) and again on March 1, 2004 (Exs. 280, 282, 339 & 340). Through consultation with, and agreement of, the applicant and primary opponents to the project, the date for the initial hearing was set for April 29, 2004 (Exs. 363, 372 & 373). Three signs with the notice and hearing information were posted on and near the property on April 14, 2004 (Ex. 384). Notice of the hearing was also published in the Columbian on April 14, 2004 (Ex. 385).

**A. April 29, 2004 Hearing:** At the commencement of the April 29, 2004 hearing, the Examiner explained the procedure and disclaimed any ex parte contacts, bias, or conflict of interest. No one objected to the proceeding, notice or procedure. No one raised any procedural objections or challenged the Examiner's jurisdiction or his ability to decide the matter impartially. At the hearing, Josh Warner, County planning staff on the project, provided a verbal summary of the project, the staff report (Ex. 390) and the various agency and departmental comments in the record.

Testifying on behalf of the applicant were Kimbal Storedahl, and his representatives: attorney Alexander (Sandy) Mackie, Randy Sweet a self employed geologist, engineering geologist and hydrologist (Ex. 476), Tom Grindeland, a hydrology engineer with West Consultants, Inc. (Ex. 473), Dudley Reiser, PhD, a fisheries biologist with R2 Resources (Ex. 474), Skip Urling a consultant with Ecological Land Services, Inc. (Ex. 478), David Weymann, a professional engineer and soil scientist with URS Consulting Engineers (Ex. 477), Neil Alongi, an environmental engineer with Maul Foster & Alongi (Ex. 470). The April 29, 2004 hearing concluded before the applicant had completed its primary presentation, and the Examiner left open the record and continued the hearing to May 13, 2004.

**B. May 13, 2004 Hearing:** At the commencement of the May 13, 2004 continuance hearing, the Examiner provided a summary of the procedures. No one objected to the

proceeding, procedure or the Examiner's jurisdiction or ability to decide the matter. The hearing began with a summary status report by Josh Warner, County planning staff. Mr. Warner identified the applicant's shoreline maps in the record (Exs. 179 & 490) and comments from County staff with revised findings and conditions related to stormwater (Ex. 550) and critical habitat (Ex. 551).

The applicant's attorney Mr. Mackie submitted a transcript of the first April 29, 2004) hearing (Ex. 580) and stated that the applicant had nothing more for its primary presentation, but reserved the right of rebuttal after opponent testimony. Also speaking in favor of the proposal was Gary Eastman, who works for Lakeside Industries and is in the asphalt and aggregate business, and Brian King of the Teamsters Union local.

Testifying in opposition were David McDonald, attorney for Friends of the East Fork, who provided several new exhibits (Exs. 569 & 525) and spoke to multiple new exhibits submitted just prior to the hearing (Exs. 514-542, 557-569, 574 & 577-579). Svend Brandt-Erichsen, attorney with Heller Ehrman also representing Friends of the East Fork provided an exhibit list (Ex. 573) and a memorandum (Ex. 582) elaborating on the previously filed SEPA appeals (Exs. 287 & 344) and additional exhibits on flooding, channel migration and impacts on protected fish species (Exs. 581, 583, 584 & 585). Scott Rose provided two exhibits (Exs. 545 & 588) and discussed the points in his SEPA appeals (Exs. 288 & 345). Dan Miller, a geologist, testified about the 1989 and 1996 floods on the EFLR (Ex. 537). Bill Dygert, a parks and openspace consultant, provided a power-point presentation (Ex. 590). Gary Loomis testified about fish populations on the EFLR, habitat restoration projects that have been conducted for many years and the effect of the 1996 flood that avulsed into the Ridgefield Pits (Ex. 406). Jack Kaeding, Executive Director of Fish First, testified about fish recovery efforts on the EFLR and spoke to several exhibits (Exs. 369, 544, 586, 592, 593 & 598). The gist of the testimony from these witnesses was that the mining operation was fundamentally harmful to fish living and breeding in the EFLR, that the conservation and monitoring measures in the HCP (Exs. 276 & 394) were inadequate, and that no more mining should be allowed in or near the EFLR. Gwenn Alley, a biologist (Ex. 594) testified on behalf of the Clark-Skamania Flyfishers, as did Ed Wickersham (Ex. 120, 557, 563 & 595). Val Alexander and Margaret Pennah, the great great granddaughter of Chief Umtuks (Ex. 575), testified about the cultural significance of this reach of the EFLR to Indian Tribes in the area and how the area contains substantial cultural and archaeological artifacts. Don Swanson, who lives north of the Daybreak mine site (Ex. 597), testified about the risk of avulsion and channel migration to fish living and breeding in the EFLR. Newt Rumble, a CPA and Ridgefield resident (Ex. 589), testified that the applicant's economic value of the HCP measures was inflated and unrealistic. Lehman Holder, Conservation Chair of the local Sierra Club Chapter (Ex. 599) testified about the damaging effects of aggregate mining in and on the EFLR. Donald Starkin, a Battle Ground resident and Clark-Skamania Flyfisher (Ex. 600), testified about the damaging effect of wash water silt on fish in the EFLR and near-by rivers. Tony Drogos testified about the damaging effects of mining on anadromous fish. Daniel Gellerup, a Vancouver resident, testified about potential contamination of the Troutdale aquifer and the possibility of similar contamination by flocculent and other chemicals used at Daybreak. Timothy Buckley, a Clark-Skamania Flyfisher, testified about the extreme importance of the EFLR for fish. Kathryn Strouse, a Vancouver resident, testified about the damaging effect the mine would have on community and public health. Joanne Wohlers, a LaCenter resident, testified about potential noise of the entire project and operation, groundwater contamination, air quality impacts, traffic safety, mosquito control

problems and the potential for diminished property values caused by the mine. Fred Guettler, a tax payer and Clark-Skamania Flyfisher, testified about the damaging effect the mine would have on fish and the loss of fish habitat it would cause. James Malinowski, a Fish First member (Ex. 552), pointed out the negative recommendation of the County's' ESA Advisory Committee (Ex. 316) and recommended denial of continued mining in the EFLR stream channel. Mr. Malinowski recommended 250-foot stream buffers and testified that the HCP and FEIS were based on bad science. Dean Swanson, a LaCenter resident (Ex. 601), testified about flooding in recent times, the huge risk of avulsion and channel migration and the damaging effect that a release of sediments and chemicals from process wash water would have on fish. Additional letters and other exhibits were received on or about May 13<sup>th</sup> in opposition to the project (Exs. 549, 554, 555, 556, 570, 571, 572, 576, 591, 596, 602, 603, 604 & 605).

At the conclusion of the May 13, 2004 hearing, the Examiner continued the matter and left the record open until June 1, 2004.

**C. June 1, 2004 Hearing:** Opponent testimony continued at the commencement of the June 1<sup>st</sup> hearing, beginning with testimony of Senator Don Carlson representing the 49<sup>th</sup> District (Ex. 647). Senator Carlson emphasized the protection of primary wild salmon producing rivers such as the EFLR and the expert testimony of Cygnia Rapp (Ex. 342) and State Geologist, Ron Telssere, that were strongly critical of this project. Richard Kennon, of Yacolt (Exs. 649, 650 & 651), testified about the damaging effect the mining operation has had, and will continue to have, on native fish populations. Craig Lynch (Ex. 652) testified about the risk of avulsion into the existing Daybreak settling ponds and the damage caused when the EFLR avulsed into the Ridgefield ponds in the 1996 flood. Bill Bakke, of the Native Fish Society (Exs. 653 & 654) testified that the EFLR is listed on Washington's 303(d) list of water quality limited streams with regard to temperature. Mr. Bakke testified that the suspended sediments and flocculent chemicals from process wash water will significantly degrade water quality and will silt-over spawning gravels. Baz Stevens, a Battle Ground resident (Exs. 110, 133, 196, 315, 379 & 553), testified against gravel mining in the proposed location and that many of the critical conservation measures proposed in the HCP are untested.

Attorney Svend Brandt-Erichsen spoke for Friends of the East Fork about a study and hydrological model performed by Richard Dyrlund (Ex. 655) that predicted a high likelihood that the EFLR would avulse into the Daybreak mine ponds and release fine sediments and flocculent chemicals into the stream. He asked that the record be left open for additional testimony from Cygnia Rapp, a Washington licensed fluvial geomorphologist, similar to her prior testimony (Ex. 342). Attorney David McDonald spoke further for Friends of the East Fork about the 1996 flood and how the EFLR channel migrated out of its normal course and avulsed into the Ridgefield ponds (Exs. 537 & 348). Mr. McDonald echoed prior testimony about the EFLR's status on the state 303(d) list as a water quality limited stream for temperature and fecal coliform and how approval of this mining proposal would exacerbate the already poor water quality – mostly from fine sediments suspended in wash water and concentrated in the Daybreak ponds and the flocculent chemicals. He pointed to several letters and other evidence in the record (Exs. 552 & 629) and stated that the two basic standards upon which the HCP were to (1) mitigate adverse impacts to the maximum extent practicable and (2) ensure that the project will not appreciably increase the likelihood that species will not survive or recover. Mr. McDonald stated that the County's standard under SEPA was different, and that the County could therefore not simply rubber-stamp the HCP as

fulfillment of its SEPA obligations. Mr. McDonald then went point-by-point through the conservation measures and discussed their inherent weaknesses. He concluded that there was an abundant supply of aggregate in the area (Ex. 613) and no new sources were needed, especially when extraction of those sources would cause such significant harm to listed fish species. With that, the opponent testimony was concluded.

The applicant's representatives began their rebuttal with Sandy Mackie, the applicant's primary attorney, who provided a comprehensive response and rebuttal to the substantive issues raised by opponents to date (Ex. 657) and a transcript of the second (May 13, 2004) hearing (Ex. 660). Mr. Mackie spoke about the County's 1996 nonconforming use determination (Ex. 40) and how that level of use is allowed by right and constitutes, as a matter of law, the base case and "no action" alternative. In response to the assertion that the project's impacts cannot be mitigated, he pointed to the HCP and stated that the end result will be far superior aquatic, riparian and terrestrial habitat than the current situation. In response to the assertion that the project will harm fish, he stated that the evidence in the record says otherwise. Mr. Mackie stated that Storedahl had a DNR reclamation permit for the Ridgefield mine site; the company followed its reclamation plan, and its bonds were released following a complete and successful reclamation according to the DNR-approved plan (Ex. 657, tab I). He pointed out that, despite the opponents' fears and warnings, the 1996 flood, which was a 500-year flood for this section of the EFLR (Ex. 657, tab N) and still the Daybreak mine ponds were not inundated. The Daybreak mine ponds did not cause siltation in the EFLR, and there is no evidence in the record to support the opponents' assertions that it did or fears that it will.

Dudley Risser, the applicant's fisheries biologist from R2 Resources, then testified about the potential effects of this mine on fish, the claims that the Ridgefield mine ponds damaged water quality and spawning gravels in the 1996 flood and the Daybreak mine ponds present a similar future danger (Ex. 657, tab G). Dr. Risser provided data of fish spawning and fish counts above and below the Daybreak mine site (and above and below the Ridgefield ponds) showing that the general decline in fish populations generally and spawning begins in 1996, following the 1996 flood, but is found above and below the Ridgefield mine site. According to Dr. Risser, this means that the declines in fish populations clearly correspond with the 500-year flood event in 1996, but the data show that population declines were not caused by the release of silt from the Ridgefield ponds. Dr. Risser testified that sediments washed out of the Ridgefield ponds when the EFLR avulsed out of its channel in the 1996 flood washed well downstream to the point of tidal influence (the LaCenter bridge) and beyond before settling out. Dr. Risser testified that there is no evidence that any of these sediments settled on spawning gravels or caused the fish population declines observed in the years following the flood. Instead, the 1996 flood literally washed out the spawning gravels, both above and below the Ridgefield mine ponds, and it washed out fish from all age classes that happened to be in the river during the flood. These effects caused the population drop, not mine pond sediments. Dr. Risser stated that gravels were returning to all sections of the EFLR that had been disseminated in the 1996 flood, even the Ridgefield ponds. According to Dr. Risser, if the opponents were correct and the Ridgefield pond sediments had caused the fish declines, then the effect would not be observed upstream of the ponds. The evidence and data provided by Dr. Risser shows fish population and spawning declines upstream of the Ridgefield ponds.

Neal Alongi, the applicant's environmental engineer, testified that the chemical flocculants used to facilitate the aggregation and settlement of fine sediments from the water column are not toxic. Mr. Alongi testified that the toxicity effects of the chemical flocculants were fully analyzed in the FEIS (Ex. 277, ch. 3, p 69), the HCP (Ex. 276, p 3-64 to 3-66 and technical appendix G) and in the Response to Comments (Ex. 278, p 76). He testified that no flocculent chemicals were used at the Daybreak site prior to 1999; consequently, the sediments in the settling ponds do not have high concentrations of the chemicals in any event. Mr. Alongi explained that, in the binding process, the flocculent molecules adhere to the suspended sediments, causing the aggregation to drop to the bottom of the water column. Once the bond occurs, the reaction is complete, and the end product is chemically and biologically inert.

Tom Grindelin, the applicant's hydrology engineer, testified that there has never been an observed or documented avulsion of the EFLR into Daybreak Pond 1. The EFLR did leave its channel and avulse into the Ridgefield ponds in 1996 but it did not avulse into the Daybreak ponds during that 500-year flood event. According to Mr. Grindelin, the existing road and dike system surrounding the Daybreak mine ponds serves (and has served) as an effective protection barrier to avulsion. The road system is outside of the historic channel migration zone and mining does not make it easier or more likely that the channel will migrate through these barriers into the ponds or the mining site. Mr. Grindelin testified that if fine sediments were released from the ponds, especially during a significant flood event, those sediments would not settle out of the water column until well into the zone of tidal influence, approximately river mile 6.

Randy Sweet, the applicant's hydrogeologist, testified further about the potential toxicity of the flocculent chemicals and how they worked – both chemically and biologically. Mr. Sweet testified that the most recent MSDS sheets (Ex. 417) show that these chemicals are nonreactive and nontoxic, and that those conclusions are confirmed by chemical and bioassay reports for testing wells in and around the site using rainbow trout fry and daphnia. To relieve fears, MEM-01 requires the operator to monitor water quality leaving the site. During the first three years of operation, CM-01 requires the operator to develop a closed-loop water clarification system that will eliminate process water discharge and the threat of sedimentation.

With that, the applicant concluded its verbal rebuttal and requested the opportunity for final written rebuttal. At the end of the June 1<sup>st</sup> hearing, the Examiner closed the hearing and ordered the record to be kept open until June 18, 2004 for any comment by all parties (Exs. 661 to 669, 671 to 674 & 679 to 684), and until June 22, 2004 for the applicant's final rebuttal and legal argument, but no new evidence (Exs. 675, 686, 691, 692, 693 & 694). The applicant also provided a transcript of the final (June 1, 2004) hearing (Ex. 685). Following the June 1, 2004 hearing, there was an additional issue regarding archaeological resources at the site that gave rise to the submission of several additional exhibits (Exs. 678, 688, 689, 690, 698 & 699). Some of these documents related to archaeology came in after the June 22<sup>nd</sup> deadline, but, for that specific issue, they were accepted. The record in this matter closed June 22, 2004.

#### **IV. Findings:**

Only issues and approval criteria raised in the course of the application, during the hearing or before the close of the record are discussed in this section. All approval criteria not raised by staff, the applicant or a party to the proceeding have been waived

as contested issues, and no argument with regard to these issues can be raised in any subsequent appeal. The Examiner finds those criteria to be met, even though they are not specifically addressed in these findings.

**A. Land Use Issues Raised by Opponents:** The opponents raised a broad range of issues in challenging the project as a whole and its individual components. Most of those arguments are described in the preceding section and the exhibits referenced therein, as well as many additional exhibits that are not individually referenced. The opponents' issues fall into several broad categories, each of which is addressed in this section. The significance of these issues relates solely to the approval criteria for the individual land use permits and approvals sought in these consolidated applications. More to the point, these issues do not give rise to a substantive SEPA claim. The substantive SEPA appeal issues are addressed elsewhere in this decision, where the Examiner concludes that, while there are likely significant adverse environmental impacts shown in the environmental record, reasonable measures are available that are sufficient to mitigate those impacts.

**1. Impacts to protected fish species and their habitat:** As outlined above, opponents to this project, and its individual components, provided a substantial amount of evidence and testimony as to the adverse impacts for fish species that live and spawn in the EFLR. These impacts take the form of physical destruction of habitat, loss of riparian vegetation, the possibility of the river's avulsion into and through the Daybreak mine ponds, degradation of water quality through increased turbidity, temperature and the introduction of toxic chemicals (flocculants and other chemicals) into the water.

As a starting point, most of the opponents argue strongly that the County should deny this proposal and prohibit further mining in the EFLR due to the damaging effects of mining, and this operation in particular, on protected wild fish. The Examiner takes official notice of the protected status of the 8 fish species and their habitat in this portion of the EFLR.<sup>9</sup> The EFLR has historically provided extremely high quality salmonid spawning habitat and has had healthy anadromous fish populations (Ex. 541). The Examiner agrees with these parties about the effect of mining on fish and fish habitat, but the cessation of mining at this site is not one of the legal options. As explained above, Clark County issued written acknowledgement in 1996 of the operator's vested nonconforming right to mine and process aggregate at this site (Ex. 40). The Washington Supreme Court has clearly stated that such nonconforming use rights must be acknowledged by local governments as a vested and valuable property right that cannot be taken away without compensation. *Rhod-a-zalea & 35<sup>th</sup> Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998). The legal implications of the 1996 nonconforming use determination is explained above, and it drives the Examiner's evaluation of the current proposal. Therefore, the analysis is a comparison of the nature and level of mining under the nonconforming use right and the nature and level of mining under the applicant's proposal. In other words, what is more protective of the public health and welfare as well as that of the fish: continuation of mining under the nonconforming use right, or expansion and relocation of mining under the current proposal.

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<sup>9</sup> The protected fish species are coho, Chinook and chum salmon, steelhead, coastal cutthroat and bull trout, Pacific lamprey and river lamprey.

**2. Effect of avulsion on fish populations:** The applicant's fisheries biologist, Dudley Reiser has provided a very detailed summary of historical fish population trends in the EFLR and the likely effect of mining at the Daybreak site under the HCP (Exs. 277, §3.6; 276, §§3.2.1 & 6; 479; 657, tab G). Dr. Reiser is a well-qualified and experienced fisheries biologist (Ex. 474), and there is no comparably qualified fisheries biologist among the opponents. It is clear, however, that virtually all of the state and federal natural resource and wildlife agencies with regulatory jurisdiction have expressed serious concerns about Storedahl's operation at the Daybreak site over the years and specific concerns about its proposal to expand (Ex. 519, 520, 523, 525, 526, 527, 528, 529, 244, 557, 558, 559, 560, 561).

It appears from the substantial amount of opponent testimony that the greatest threat to fish in the EFLR presented by this proposal is the risk of avulsion of the river into and through the Daybreak mine ponds and the subsequent release of fine sediments. The process of avulsion and the substantial change in stream channel that would occur could result in a loss of spawning habitat, as well as a potentially significant segment of many year classes of fish that happen to be in the river during the flood event that causes the avulsion. Opponents point to the avulsion of the EFLR into the Ridgefield pits in the 1996 flood as a model of the damage that could occur if the EFLR were to avulse into the Daybreak mine ponds, at least before those ponds are reclaimed and vegetated under the HCP. Based on this testimony, the Examiner focuses his attention on data related to the 1996 flood event in attempting to gage the potential impact of another similar flood event and avulsion in the EFLR.

The record indicates that the 1996 flood was a 500-year event on the EFLR; although, it appears to have been a 100-year flood event on many of the other rivers in the region (Ex. 657, tab N). While many witnesses testified to reduced fish populations – as measured by both fish counts and redd counts – Jack Kaeding of Fish First was the only witness to provide relevant, quantitative, peer-reviewed data for the EFLR and other near-by rivers during the period before and after the 1996 flood (Exs. 543 & 544). These data clearly confirm the observations of numerous fishermen that fish populations plummeted following the 1996 flood. In particular, Tables 3 and 4 from the report provided by Mr. Kaeding (included in Ex. 543) show declines for several sections of the EFLR: (1) Lockwood Creek to Daybreak Bridge, (2) Daybreak Bridge to Lewisville Bridge, (3) Lewisville Bridge to Lucia Falls, and (4) Lucia Falls to Dole Valley Bridge. These data show dramatic declines that increase from top to bottom of the EFLR basin. However, the report that accompanies these data analyze only for the effect of the 1996 flood and not the potential effect of the EFLR avulsion into and through the Ridgefield ponds.

Mr. Kaeding attributes the fish declines shown in this report to the damaging effects (siltation and loss of spawning habitat) of silt from the Ridgefield pits. While he is clearly qualified to testify about his personal observations of fish populations in the EFLR and other rivers, Mr. Kaeding is not a fisheries biologist and is not qualified to perform statistical analyses on the data he provided. In fact, the data and reports that Mr. Kaeding provided include little by way of data analysis and say very little about the precise causes of the observed fish declines other than to link the declines to the 1996 flood. In particular, these data and the report do not address the potential effect of the Ridgefield pits.

The critical question that must be addressed and resolved, however, is whether the fish population declines observed after the 1996 flood were caused by the avulsion of the EFLR into the Ridgefield ponds or not. If yes, then a similar avulsion of the EFLR into the Daybreak ponds – which appears relatively likely to happen sometime in the next 25 to 50 years – would be a cause of damage to the river's fish populations. If not, then there is no scientifically credible basis for claiming that an avulsion into and through the Daybreak mine ponds would be harmful to the River's fish populations.

The applicant's fisheries expert, Dr. Dudley Reiser, analyzed the data and reports provided by Mr. Kaeding (Ex. 567, tab G). Dr. Reiser also performed additional statistical analyses on the raw data and interpreted the results in addressing whether the data show any impact that could be attributed to the EFLR avulsing into the Ridgefield ponds. The Examiner finds Dr. Reiser's analysis to be compelling, competent and directly relevant expert testimony on the question of whether the avulsion of the EFLR into the Ridgefield pits in 1996 is the ultimate or proximate cause of fish declines observed in the following years. In particular, the Examiner adopts as his own the following conclusions provided by Dr. Reiser:

Table 1. Comparison of mean redd counts in four segments of the East Fork Lewis River pre-and post-1996 flood. Data source WDFW.

Reach	Mean No. Redds 1988-1994 (Pre-1996 flood)	Mean No. Redds 1997-2002 (Post- 1996 flood)	% Post- vs. Pre 1996 flood Mean Redd Counts
Lockwood Cr. to Daybreak Br.	69.2	3.8	5
Daybreak Br. To Lewisville Br.	44	3.7	8
Lewisville Br. To Lucia Falls	33.5	16.3	48
Lucia Falls to Dole Valley Br.	70.5	44.3	62

The analysis attests to the severity of the 1996 flood with all reaches having lower average numbers of redds under post-flood conditions, in particular the lower two reaches. An upstream gradient in the actual percentages of post- to pre-flood averages is evident: 5%, 8%, 48% and 62%. This suggests that flood related impacts to salmonid spawning habitats increased in the downstream direction, as would be expected when considering how flooding occurs, i.e., flow increases in a downstream direction and deposition of sediment occurs in the lower reaches. The loss of approximately 1 mile of channel that had been used for spawning due to the flood-induced avulsion into the Ridgefield Ponds likely contributed, at least temporarily, to the reduction in redds in the Daybreak Bridge reach. However, a similar reduction in redds occurred in the next segment (Lewisville Br.) suggesting that this reach was as severely impacted by the flood as the Daybreak Bridge reach even though it is upstream from the mining activities.

\* \* \*



We completed a simple regression analysis of these data sets and observed a close correlation ( $r^2$  of 0.92) between the trends occurring in the Daybreak reach with those in the Lewisville Br. reach that extends upstream about 1.5-2 miles. The strong correlation suggests the two segments (one within and one above the mining area) are responding similarly from year to year, including the period after the 1996 flood. Correlations between all segments are presented in Table 2.

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We also considered the data based on percentages and noted the same trends between the different reaches (Figure 2). The data also indicated a shift in redd distribution to the most upper reach – Dole Valley, following the 1996 flood, while there was a decrease in redds in the lower two segments.

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...the segment above Lucia Falls is behaving distinctly from the other three, and the downstream two sections are behaving somewhat similarly. These latter two segments include one reach within (Daybreak Br.) and one above the Daybreak Mine site. Overall, the data do not show any distinct differences in trends in redd abundance in the Daybreak Br. site with trends in the other sites that can be directly linked to mining-related (e.g., avulsion) rather than flood-induced factors.

Ex. 657, tab G, pp 4-7.

Based on this evidence, analysis and expert opinion, the Examiner concludes that the fish population declines observed in the EFLR since the 1996 flood are not attributable to the River's avulsion into and through the Ridgefield pits, but rather were caused by the flood event generally. If the fish declines were attributable to the inundation of the Ridgefield mine pits, then the data would show a significant difference between redd counts above and below the mine site. On this basis, the Examiner concludes that, should the EFLR avulse into the Daybreak ponds, fish populations would suffer, but not because of the sediments released from the old mine ponds. The record shows that flood events are bad for fish populations, but the data do not show that river avulsion into and through old mine ponds is necessarily detrimental.

**3. Habitat improvement or loss from avulsion:** Another aspect of river avulsion and its potential effect on salmonid habitat merits discussion. It is clear that the loss of spawning gravels – either because they are swept away or silted – is detrimental to salmonids, and this appears to have happened on the EFLR in the 1996 flood. However, the substantial evidence in the record indicates that these detrimental effects are not attributable to the River's avulsion into and through the Ridgefield ponds, and there is no evidence that an avulsion through the Daybreak ponds would be any different. The opponents categorically assert that avulsion through old mine ponds are necessarily detrimental to salmonids and their habitat. The record does not support this contention. In particular, the Examiner is persuaded by the following expert testimony from Dr. Reiser:

The Ridgefield Ponds that were connected via the avulsion provided and continue to provide important juvenile salmonid rearing habitats. When I first became involved in this project one of my thoughts was that the riverine connection of Ridgefield ponds may actually be beneficial to salmonids, especially juvenile fish that naturally seek slow moving waters for feeding and shelter. I previously was involved in a project in Idaho (on the Yankee Fork of the Salmon River) that focused on connecting off-channel dredge ponds to the main river channel to provide rearing habitats for Chinook Salmon and steelhead. ... Subsequent monitoring suggested that pond use by fish was occurring but that the addition of structural cover (e.g., woody debris) would likely increase use. Several of the Ridgefield Ponds already contain substantial wood structure and more is being recruited annually. Results of snorkel surveys within the ponds has confirmed use by juvenile salmonids. CM-10 described in the HCP will provide important information relative to salmonid use in these ponds.

Ex. 657, tab G, p 10.

This testimony, confirmed by other testimony in the record documents the use of off-channel areas by juvenile salmonids, especially Chinook salmon and steelhead. The loss of such quiet areas was one of the primary bases of objection to the channel deepening of the Columbia River mainstem during the past few years. This testimony raises the question of whether an avulsion through the Daybreak ponds might eventually be beneficial to fish by creating off-channel habitat for juveniles. The risk of harm from such an avulsion would be greatest in the period before the Daybreak ponds are partially filled and the planned vegetation becomes established. Dr. Reiser's provides additional testimony on his observations that that the Ridgefield ponds have partially filled since the 1996 flood event, that there has been substantial gravel recruitment into the ponds, and that there has not been a major increase in predatory fish in the Ridgefield ponds since they became part of the EFLR channel.

If the Ridgefield ponds provide any model of what to expect from an avulsion of the EFLR into the Daybreak ponds, the Examiner finds that salmonid habitat may, in fact, be improved, especially if the reclamation and mitigation trees and other plantings required under the HCP have become established. At a minimum, the habitat conditions will certainly be much worse if the HCP is not implemented and Storedahl continues mining and processing within the floodplain as it appears to be entitled to do under its nonconforming use right (Ex. 40). Under the HCP, the habitat conditions for salmonids and other organisms that use river and riparian habitats will be much improved over the current situation, and much improved over the conditions that would otherwise exist if Storedahl were to continue operation under its nonconforming use right.

**4. Risk of avulsion occurring:** The record includes a substantial amount of evidence, expert opinion and discussion about the geomorphology of the EFLR, channel migration and the likelihood of river avulsion into and through the Daybreak ponds. In particular, Cygnia Rapp, whom the Examiner considers to be an expert in fluvial geomorphology, testified that the applicant underestimated the EFLR's sediment transport ability, gravel recruitment and other aspects of the River's geomorphology (Ex. 342) and ultimately underestimated the chance of avulsion into the Daybreak ponds. The applicant's geomorphologist rebutted this and other testimony that challenged the

applicant's sediment transport model and many related aspects of the HCP (Exs. 580 at pp 98-113; 276 fig. 3-5; & 657 tab F). The Services analyzed the issue extensively in the FEIS (Ex. 277, ch. 3, p 69), the HCP (Ex. 276, pp 3-64), the Response to Comments (Ex. 278, p 76) and the BO (Ex. 439, pp 59-62). Finally, the HCP includes six conservation measures designed to reduce the risk of avulsion and the harmful consequences should the EFLR avulse through the Daybreak ponds (Ex. 276, §4.3, CM-05 through CM-10).

The Examiner takes at face value the uncertainties of fluvial modeling, as explained by Ms. Rapp, and the high likelihood of another avulsive event on the EFLR in the not-too-distant future, but probably outside of the 20-25 year life of this mining proposal. The applicant recognized the reasonable risk of avulsion and has proposed measures to reduce the likelihood of avulsion<sup>10</sup> and the severity of damage that might occur.<sup>11</sup> It seems relatively apparent that the channels of high-energy rivers, such as the EFLR migrate regularly. However, the critical question is to what extent this mining proposal will make avulsion more likely, and what is the biological consequence of an avulsive event?

The biological consequence of an avulsion is discussed above, and the Examiner has already found that flood events that cause avulsion appear to be more damaging to fish populations than the actual avulsion through old mine ponds. Moreover, it appears that river flow through such pond areas may, in fact, create a more diverse fish habitat, particularly habitat for juvenile Chinook salmon and steelhead (Ex. 657, tab G). The Examiner finds that the applicant's geomorphological analysis may not be based on the most recent or detailed data from the EFLR. However, an avulsion through the Daybreak ponds is more likely, and more likely to be severe under current, unreclaimed conditions than under the applicant's mining proposal. The Daybreak mine ponds presently exist and have not been reclaimed, revegetated or otherwise stabilized to reduce the likelihood of avulsion or damage to the EFLR. Moreover, aside from the HCP, there is unlikely to be any meaningful restoration other than what WDNR might require under Storedahl's current mine reclamation plan (Ex. 30) and the state's mine reclamation requirements, none of which will address avulsion or ecological issues.

As part of this expansion proposal, Storedahl proposes several measures to protect, partially fill, revegetate and stabilize the Daybreak ponds, to generally replace lost riparian habitat, reduce the likelihood of an avulsion, and reduce the magnitude of damage when one occurs.<sup>12</sup> All of these measures that collectively reduce the likelihood

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<sup>10</sup> E.g., CM-08.

<sup>11</sup> E.g., CM-09.

<sup>12</sup> In particular, CM-06 entails revegetation of the river valley bottom forest habitat. CM-11 involves off-site floodplain enhancement. CM-12 requires the conveyance of the site in fee to a conservation or similar private organization resulting in permanent preservation of the site. CM-13 entails several riparian zone management techniques for Dean Creek. CM-14 involves in-channel habitat enhancement for selected reaches of Dean Creek. CM-15 calls for shallow water and wetland habitat creation. CM-16 involves techniques for the control of non-native predatory fish, and CM-17 will create Oregon Spotted Frog habitat (Ex. 276). The result will be an increase above current conditions, without the HCP, of 86 acres of upland forest, 28 acres of forested wetlands, 26 acres of emergent wetlands, 42 acres of open water habitat, a reduction of 159

of avulsion, protect and restore habitat will occur with this proposal; none of them will necessarily happen under the status quo and Storedahl's current nonconforming use right (Ex. 40). Therefore, the Examiner finds that river and riparian habitat will be better with the HCP and the mining expansion than without it.

**5. Water quality impacts from the mine operation:** There was a substantial amount of opposition testimony regarding water quality impacts from point-source water discharges from the site, most notably increased water temperature, suspended solids and turbidity. As a preliminary matter, the Examiner takes official notice of the EFLR's status as a 303(d) listed water quality limited stream for three water quality parameters: temperature, pH and fecal coliform. The River's listed salmonids and trout are particularly sensitive to water temperature, *i.e.*, they require cold water, and higher temperatures reduce the water's ability to dissolve oxygen. While the lower EFLR is not 303(d) listed for turbidity, the applicant reports that the turbidity of its process water discharge out of Pond 5 sometimes exceeds its NPDES permit limitations, and its discharge has higher turbidity readings than normally occurs in the River (Ex. 276, p 3-50). Suspended sediments produce higher turbidity, which also promotes higher water temperatures. Prolonged exposure to elevated turbidity levels and suspended solids adversely affects respiratory, gill function and general physiology of salmonids (Ex. 439, pp 55-59). Sediments and silt also cover gravel beds that salmonids use for spawning, thus limiting available spawning habitat, and suffocating eggs once they have been laid. Fecal coliform comes primarily from contamination by septic systems and farm animal pastures and is not particularly related to this mining operation.

The point source outfall from the site is out of Pond 5 into Dean Creek which flows into the EFLR. The source of the sediments and, to a certain extent, the turbidity appears to be the process wash water discharged into the pond system. Storedahl has apparently been using dry process for aggregate washing for several years while its shoreline permit has been pending, thereby reducing the suspended solids and sediments in the pond system. With the approval of this expansion proposal, Storedahl hopes to resume wet wash processing for the first 3 years of the approval, after which CM-01 requires conversion back to closed-loop clarification system, *i.e.*, dry processing, that will "effectively eliminate process water discharge." For those first few years while Storedahl is wet processing, MEM-01 requires Storedahl to monitor sediments, turbidity and other water quality parameters in the wash water discharge. CM-04 also requires Storedahl to alleviate water temperature discharge problems by pumping cooler water from the bottom of Pond 5 during the warmer months.

There is a history of complaints about water quality problems on the EFLR and Storedahl's exceedence of its NPDES permit limitations in the discharge from Pond 5 into Dean Creek (Exs. 247 & 268). It is not clear whether or how activities at the Daybreak mine site may have affected the River's 303(d) listing. However, the Examiner finds that increased levels of suspended sediments and turbidity are certainly possible, if not fairly likely, should Storedahl resume wet processing. Monitoring has not prevented these exceedances in the past, and there is no reason to expect it will prevent them in the future. Increases in suspended sediments and turbidity could result in further violations of Storedahl's NPDES permit limitations and, at a minimum, would adversely

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acres of land in agricultural (pasture) use, and a reduction of 23 acres that would otherwise be paved or compacted gravel (Ex. 393).

affect water quality and the fish in the EFLR. The record shows that Storedahl was prohibited from using the pond system to process wash water pursuant in February 2001 when the County issued a stop work order (Ex. 212). Following that, Storedahl used a dry process system for at least a limited period of time while a rock crusher was on site, and has indicated its plan to not resume wet processing unless or until the shoreline permit is approved as proposed. The Services, in their BO stated that the use of the closed-loop dry processing of wash water will provide substantial benefits to listed species in a number of different ways (Ex. 439, pp 59-60).

In light of the foregoing, the Examiner finds that preservation of water quality in the EFLR requires that Storedahl not resume wet processing, and that it shall continue dry processing only. This will limit the accumulation of fine sediments and flocculent chemicals in the Daybreak ponds and hopefully reduce suspended solids and the turbidity of the discharge from Pond 5 into Dean Creek. In the Examiner's view, dry processing is necessary to assure compliance with the fourth and fifth shoreline permit approval criteria in WAC 173-27-160 (1)(d)&(e),<sup>13</sup> discussed below under the Shoreline Permit section (Findings 57, 67 & 68), and the conditional use permit criterion (Finding 39). See Condition A-3.

**B. Approval Criteria:** The following issues were addressed by County staff members, in their reports or by agency comments on the application, and the Examiner adopts the following findings with regard to each:

## **1. REZONE APPLICATION**

The project proposes to apply the County's Surface Mining Combining district (S) designation to approximately 100 acres that is presently zoned AG-20 (Exs. 57 & 389). All of the land proposed for the new overlay is located outside of the 100-year floodplain, and most of it is north and east of the 5 existing Daybreak ponds, south and west of J.A. Moore Road and will be contiguous with the existing land, which already bears the surface mining overlay designation (AG-20-S). The only area south of the ponds proposed for the overlay designation will be the processing area, and it too is outside of the 100-year floodplain.

The rezone request does not propose to change the underlying AG-20 zone, but to augment that designation with the surface mining overlay. The AG-20 zone, which is described in CCC chapter 18.302, allows aggregate extraction but requires application of the Surface Mining Overlay described in CCC chapter 18.329, using the 4 zone change criteria in CCC 18.503.060. The zone change criteria do not provide any special or different process or analysis when the proposal is to add an overlay district, as opposed to a complete change in the base zone. Consequently, the Examiner concludes that all of the criteria in CCC 18.503.060(1)-(4) apply, but the analysis will take into account the fact that the AG-20 zone is one of only three zoning districts in the County that allow aggregate extraction, and then only by application of the surface mining overlay.<sup>14</sup>

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<sup>13</sup> WAC 173-27-160(1)(d)&(e) respectively require: "that the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located" and "that the public interest suffers no substantial detrimental effect."

<sup>14</sup> The table of allowed uses in CCC chapter 18.302, permits outright the exploration for rock and gravel in the FR-80, FR-40 and AG-20 zones, but requires application of the surface

- a.** Rezone Criterion 1 – CCC 18.503.060(1): *The zone change is consistent with the comprehensive plan map designation.*

**Finding 1** – The comprehensive plan designation for the subject property is Agricultural (AG-20). The Surface Mining Combining District (S) is an overlay that can be combined with other resource zones, *i.e.*, FR-80, FR-40 and AG-20, but not with other rural zones and not with urban zones. See Comp Plan Policy 4.5.15, pg. 4-17. Resource designations include agricultural and forestry zones. Therefore, this requirement is met.

- b.** Rezone Criterion 2 – CCC 18.503.060(2): *The requested zone change is consistent with the plan policies and locational criteria and the purpose statement of the zoning district.*

**Finding 2** – Comprehensive Plan Table 4.4 (page 4-8) provides a matrix for assessing the feasibility of designating and protecting mineral resource lands. The application evaluated these criteria (Ex. 57, pp 36-37). Staff evaluated the criteria and identified how this proposal for this property fits into that matrix, based on documentation in the record (Ex. 390, pp 29-30). According to staff, the proposed rezone falls between “protection desirable” and “protection highly desirable.” Based on the evidence in the record and staff’s favorable recommendation, the Examiner agrees and adopts the following matrix and analysis of the relevant factors:

**Comprehensive Plan Table 4.4 Matrix for Assessing Mineral Resources**

	NOT SUITABLE	CONSIDER FOR PROTECTION	PROTECTION DESIRABLE	PROTECTION HIGHLY DESIRABLE	PROTECTION CRITICAL
QUALITY OF DEPOSIT	Low grade deposit.	Variable but located near use area or processing plant.	Deposit made economical to mine by upgrading material.	Grade meets the requirements for road construction or can be upgraded.	Concrete quality.
SIZE OF DEPOSIT	Small deposit.	Small deposit (less than 2,000 tons).	Medium-size deposit.	Large deposit (7.5 million tons).	Very large deposit (10 million tons).
ACCESS DISTANCE FROM MARKET	More than 20 miles from use area.	Distance from use area is minimized due to access to interstate.	Less than 10 miles from the use area; alternative access route available.	Large deposit presently beyond economical hauling distance to present use areas. Near highways: access can be provided.	Within 5 miles of uses area. Adjacent to highway with access for trucks.
COMPATIBLE WITH NEARBY AREAS	Adjacent land use presently incompatible with mining (appreciable residential development within range of excessive noise, dust, blasting, vibrations, etc.).	Scattered development within outer range of impacts of mining; owners may not object to mining.	Adjacent land suitable for development and within commuting distance of use area.	Imminent incompatible development on adjacent lands.	No incompatible land uses existing or likely in the foreseeable future (adjacent land in national forest, operator's ownership, agricultural land use.)

mining overlay for extraction and processing in these zones. These uses, and thus the application of the surface mining overlay, are not allowed in any other County zones.

IMPACT OF NOISE	Noise level in adjacent presently developed areas would clearly exceed standards if mining occurred.		Noise level in adjacent undeveloped areas would exceed standards for likely use, but use of these areas can be easily delayed or economical mitigation can be provided by barriers.		Noise at adjacent residential are less than 50 dB(A) due to distance or topographical barrier, berm can be constructed easily.
IMPACT OF BLASTING	Too close to existing subdivision.				<b>Blasting not required;</b> permanent open space between quarry and other uses; topographic barrier between quarry and other land uses; only occasional light blasting; blasting compatible with adjacent uses.
IMPACT OF TRUCK TRAFFIC	Only access is local road through residential area.	Slightly longer alternative route exists.	Alternative truck route can be built at reasonable expense; <b>alternative transportation</b> (conveyor, etc., can be used past residential streets).		Adjacent to freeway with access to site.
VISUAL IMPACT	Mining would destroy or create.	Mining activity cannot be screened and would permanently alter landscape.	<b>Some activity visible from residential areas, but no permanent deterioration of landscape.</b>	Mining activity can be easily screened by berms and/or vegetation.	Activity screened by topography or vegetation, or appreciably reduced by distance.
WETLANDS IMPACT	High quality wetlands throughout the site.	High quality wetlands only on a portion of site and can be avoided.	<b>Lower quality wetlands on site and can be mitigated.</b>	<b>Wetlands can be avoided on site.</b>	No or minimal wetlands on site and of low quality.
SLOPES	Site located in active unstable slope area.	Potential or historical unstable slopes.	Unstable slopes on site can be avoided.	Minimal slopes throughout the site.	<b>Level grade mining site with minimal slopes.</b>
BIOLOGICAL IMPACT	Rare and endangered plants or animals on-site.	Site includes prime wildlife habitat that would be permanently removed by mining.	<b>Species of Special Concern located on site.</b>	Minor or temporary loss of wildlife habitat.	No significant biological resources; rehabilitation of site would replace or create habitat.
IMPACT OF FLOODING	Mining would cause erosion of adjacent property; could be prevented only at great expense.		Mining would create erosion hazard for roads, bridges, and utility lines; however, these structures could be strengthened at reasonable costs.	***	Mining would create flood control channel and would not damage adjacent land.

- The quality of the deposit is addressed in the application (Ex. 57) in a letter from Randy Sweet, a Registered Geologist, to Kimball Storedahl as well as several letters from end-users of the material. This evidence states that the aggregate is high quality.
- The letter from Randy Sweet (Ex. 57) states that the size of the deposit is 10-12 million tons, net.
- The Daybreak site is less than 5 miles from several markets, including La Center, Battle Ground and Ridgefield. The site is also within 7 miles of the Vancouver Urban Growth Boundary (UGB).
- The compatibility with nearby areas is a reflection of how surrounding uses will potentially be impacted by the proposed rezone. Surrounding zoning is agricultural and rural residential (58 acres of the site currently has the surface mining overlay) (see table on pg. 11). While the categories for this criterion are somewhat difficult to objectively review, based on staff's recommendation and the evidence in the record, the Examiner concludes that the aggregate and sand resource at this site is somewhere between *consider for protection* and *protection desirable*. *Protection critical* requires that 'no incompatible uses exist' and defines compatible lands as National Forest, operator's ownership or agricultural land uses. While land to the south is agricultural, properties to the north and east are residentially zoned and developed. Because many of the adjacent properties are already improved the development is not 'imminent' as is suggested by the *protection highly desirable* category. The *not suitable* category is also not appropriate because adjacent land use is not presently incompatible with mining, and some of the parcels are currently zoned for mining. Based on the conclusions stated in the Final EIS (Ex. 277), the Examiner concludes that the mine will not result in excessive noise, dust, blasting, vibrations, etc. on any surrounding residential development. Based on these considerations, the Examiner concludes that the *consider for protection* and *protection desirable* categories are both possible, and there is no clear distinction between the two for this specific case.
- The impact of noise from the proposed mining expansion is addressed below under a separate section and in Appendix B of the Final EIS (Ex. 277). The predicted loudest L<sub>25</sub> from excavation and crushing (L<sub>25</sub> is the sound level exceeded 25% of an hour) range from about 45 to 67 dBA<sup>15</sup> without mitigation. With mitigation, all of the noise levels are predicted to be below 60 dBA, which would not exceed the maximum noise limit from an industrial use on a residential receptor under state standards, i.e., WAC 173-60-040. On this basis and in light of the applicant's proposed (required) mitigation, the Examiner concludes that this proposal best fits the *protection desirable* category.
- There will be no impact from blasting because the aggregate is unconsolidated at this site and does not require blasting.

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<sup>15</sup> dBA is an abbreviation for A-weighted decibels, which are sound pressure levels in decibels measured using the "A" weighted network on a sound level meter.



- The impact of truck traffic from this location will be mitigated by the fact that a conveyor system is proposed to bring aggregate from the east side of NE 61<sup>st</sup> Avenue and Bennett Road to the processing area. Truck traffic leaving the site is evaluated below under Transportation Concurrency. This analysis concludes that there will not be a degradation of the level of service (LOS) at any of the studied intersections, and there do not appear to be any safety issues that would be worsened by the proposed development. Based on these factors, the Examiner concludes that the development fits the *protection desirable* category.
- The visual impact of this proposal will vary significantly over time. Much, but not all, mining will be screened from public roads and adjacent residences (Ex. 277, Fig. 2-2). Following reclamation, the site will be a mix of open water, created wetlands and mixed valley-bottom forest (Ex. 277, Fig. 2-3 & 2-9). Based on this factor, the Examiner finds that the *protection desirable* category is the most appropriate.
- There are 4 small relatively low quality wetlands on the site (Exs. 309 & 279, app B). Three of the wetlands will be avoided during the mining operations and one (¼ acre in size) will be destroyed. That wetland, however, is currently under agricultural cultivation, has been determined to be of low quality (Ex. 309), and will be sufficiently mitigated with created wetlands on-site. Based on this factor, the Examiner finds that the proposed rezone falls somewhere between *protection desirable* and *protection highly desirable*.
- The natural slopes on the site are less than 4% on this relatively flat valley floor, which militates in favor of the *protection critical* category.
- The biological impact of this proposal will, again, change over the life of the project. While there are no known endangered species on site, there are endangered salmonid species in the EFLR (Exs. 276 & 277), which is adjacent to the site. The applicant has gone through a process with the Services to minimize and mitigate potential impacts to covered species. A HCP was developed and will be implemented if this project is approved. There is little existing on-site prime wildlife habitat. The existing forested areas of the site would be preserved. As mining takes place, reclamation will also take place to create emergent wetlands and valley-bottom forest. Based on this factor, the Examiner finds the proposal best fits the *protection desirable* category.
- The impact of flooding on site does not fit neatly into any of the categories provided in the table. The proposal would not create an erosion hazard (see Stormwater and Erosion Control section, below) and it would not intentionally create a flood control channel. Erosion is not likely to cause damage to adjacent lands, and for this reason, as well as the others articulated above, the Examiner finds this militates in favor of the *protection highly desirable* category.

Finding 3 – Comprehensive Plan Policy 4.4.1: *Encourage the conservation of the county's highest quality agricultural lands for productive agricultural use and protect the opportunity for these lands to support the widest variety of agricultural crops and products as listed in RCW 36.70A.030(2) by designating agricultural lands of long-term commercial significance.* The site where the surface mining overlay is proposed is not high quality agricultural land. According to the Clark County Soil Survey, the soils range

from poor to moderate agricultural value (Exs. 279, pp 23 & 359). The crops that have been grown on the site have required irrigation because of the top soils' poor moisture retention capacity (Ex. 277, ch 3, p 21). Also see Comprehensive Plan Policy 4.4.4, below. The proposed rezone meets this policy.

Finding 4 – Comprehensive Plan Policy 4.4.2: *In order to conserve commercial agricultural lands, the county shall limit residential development in or near agricultural areas and limit public services and facilities which lead to the conversion of agricultural lands to non-resource uses.* The proposed rezone to allow surface mining will limit residential development on the site. Implementation of the HCP will result in the land being reclaimed and restored to natural conditions and ownership transferred, with a conservation easement, to a not-for-profit or public agency(s) for inclusion in the open space being secured along the East Fork Lewis River greenbelt. No additional public services or facilities are proposed or required as a result of this rezone request. The proposed rezone meets this request.

Finding 5 – Comprehensive Plan Policy 4.4.4: *The primary land use activities in agricultural areas shall be commercial agriculture, forest management, mineral extraction, ancillary uses and other non-agricultural related economic activities relying on agricultural lands.* The current uses of the site are mining related activities as well as agricultural activities such as row crops and hay. The proposed rezone to add the surface mining overlay will allow commercial extraction of aggregate. The proposed rezone meets this policy.

Finding 6 – Comprehensive Plan Policy 4.4.7: *Commercial agricultural land considered desirable for acquisition for public recreational, scenic and park purposes, shall first be evaluated for its impact on a viable agricultural industry.* While the applicant proposes to donate the site to a not-for-profit or public agency after the termination of mining and reclamation, there is no evidence that it is being considered for purchase for public purposes. Therefore, the Examiner concludes that this policy does not apply to this proposed rezone.

Finding 7 – Comprehensive Plan Policy 4.5.1: *Support the conservation of mineral lands for productive economic use by identifying and designating lands of long-term commercial significance, consistent with the 20-year planning horizon mandated by growth management.* As discussed in the matrix above, this proposed rezone would support the conservation of a desirable mineral resource of significant commercial value. On this basis, the Examiner concludes that the proposed rezone meets this policy.

Finding 8 – Comprehensive Plan Policy 4.5.3: *In identifying and designating commercial mineral lands, the following factors should be taken into consideration: geological, environmental and economic factors; existing and surrounding land uses; parcel size; and public service levels that are conducive to long-term production of mineral resources.* The Examiner concludes that the analysis attendant to the matrix above adequately addresses these issues, and the rezone complies with this policy.

Finding 9 – Comprehensive Plan Policy 4.5.6: *Encourage restoration of mineral extraction sites as the site is mined, consistent with requirements identified in RCW 78.44.* The proposed rezone and mining expansion have an extensive reclamation plan that is integrated into the HCP (Ex. 276). Mined areas will be reclaimed at the end of each mining phase. The Department of Natural Resources (DNR) is responsible for

implementing RCW chapter 78.44, and DNR reviews and issues reclamation permits. The County will not issue a final site plan approval prior to DNR issuing a revised reclamation permit. See Condition A-1. On this basis, the Examiner concludes that the proposed rezone meets this policy.

Finding 10 – Comprehensive Plan Policy 4.5.7: *Land shall not be used for any activity other than surface mining or uses compatible with mining until the gravel or mineral resource is depleted, reasons for not mining the site are clearly demonstrated, or the site has been reclaimed.* The rezone and mining plan propose to extract gravel from all allowable areas, excluding 100-year floodplain and within required setbacks. On this basis, the Examiner concludes that the proposed rezone meets this policy.

Finding 11 – Comprehensive Plan Policy 4.5.8: *Surface mining other than Columbia River dredging shall not occur within 100-year Floodplain.* The site includes portions of the 100-year floodplain of the EFLR (Ex. 389). However, the proposal does not include any mining within the designated 100-year floodplain identified by FEMA, the agency which is charged with mapping floodplains. See Condition B-11. This prohibition is explained in the Final EIS (Ex. 277, ch 3, p 26) and the HCP (Ex. 276, pp 2-15). On this basis, the Examiner concludes that the proposed rezone and mining plan meet this policy.

Finding 12 – Comprehensive Plan Policy 4.5.9: *Mineral extraction operations shall be conducted in a manner which will minimize the adverse effects on water quality, fish and wildlife, adjacent activities and the scenic qualities of the shorelines. Any adverse impacts shall be mitigated.* This policy is addressed by many of the county ordinances, the shoreline master program and the SEPA process. The FEIS and HCP (Exs. 276 & 277) include 18 conservation measures that will minimize impacts to water quality, fish and wildlife habitat and surrounding land use activities. The conclusion of the FEIS is that all potentially adverse environmental impacts are mitigated. The scenic qualities of the shoreline are addressed below in a separate section. Based on these facts, the Examiner concludes that this policy is met.

Finding 13 – Comprehensive Plan Policy 4.5.11: *Designated mineral operations of long-term commercial significance are not exempt from the normal environmental review process of the county or state agencies.* The proposed rezone and mining operation have been subject to an extensive environmental review at the county, state and federal levels. The project has been through a NEPA process as well as the creation of a HCP in cooperation and consultation with the Services. The applicant has worked with the USACE on wetland issues (Ex. 346). Various agencies at the state level have also reviewed or will review this application or related applications including the Washington Department of Ecology (DOE) for shorelines and water quality; the SWCAA for air quality; and, the DNR for mine reclamation. Clark County has reviewed the application for compliance with SEPA and the County's substantive regulatory schemes discussed elsewhere in this decision, e.g., rezone, conditional use permit, site plan, wetland permit, habitat permit and shoreline permit. On this basis, the Examiner finds that this policy is met.

Finding 14 – Comprehensive Plan Policy 4.5.14: *The county shall allow continued mining at existing active sites.* As mentioned above, there is a nonconforming use right at this site that was described by the County and certificated in 1996 (Ex. 40). Even though there has not been any extraction activity at this site for several years, extraction

is part of that claimed nonconforming use right. The present proposal to change and expand the existing Daybreak site would allow continued mining at this site generally, albeit the extraction area would move from the floodplain to the uplands. On this basis, the Examiner concludes that this policy is met.

Finding 15 – Comprehensive Plan Policy 4.5.15: *Potential aggregate sites or expansion shall not be designated within rural zoning categories.* This site is located in the AG-20 district, which is a resource zone and not a rural zoning district. The Examiner finds that this policy is met.

Finding 16 – Comprehensive Plan Policy 4.5.18: *Some level of processing should be associated with mineral extraction.* The applicant is proposing to crush rock and process on site in conjunction with extraction, thus meeting the policy.

Finding 17 – Comprehensive Plan Policy 4.5.19: *Future sites designated with a surface mining overlay shall be assessed on a case by case basis, based on the commercial or industrial value of the resource, and the relative quality and quantity of the resource as well as the following conditions:*

- *The resource should be of a quality that allows it to be used for construction materials or meet applicable quality specifications for the intended use(s);*
- *The resource should be of a quantity sufficient to economically justify development based upon the characteristics of the aggregate, life of the resource site, cost of extraction, accessibility, opportunity, type of transportation and the location of high demand areas; and,*
- *Designation of these mineral resource lands should follow the "Criteria for Designating Mineral Resources," as outlined in the Designation Criteria component of the Rural and Natural Resource Element.*

The Examiner addressed all of these issues above in the matrix and attendant analysis, and on that basis, the Examiner concludes that this policy is met.

- c. Rezone criterion 3 - CCC 18.503.060(3): *Except for industrial designation, conditions have substantially changed since the zone was applied to the property and that the rezone furthers public health, safety, morals or welfare.*

Finding 18 – Staff suggested that the first part of this criterion (“conditions have substantially change since the zone was applied...”) does not apply to this specific rezone application because it is only asking for the application of an overlay to the existing AG-20 zoning on the property. The proposal is not to change the underlying zone, but to augment the range of agricultural uses by applying the surface mining overlay. The comprehensive plan contemplates the possibility of this overlay designation on the three primary resource zones in the county, *i.e.*, FR-80, FR-40 and AG-20, and is simply implementing specific provisions from the comprehensive plan. This does not preclude the application from meeting the other criteria in CCC 18.503.060 in order to receive the surface mining overlay.

The Examiner is disinclined to exempt this application from the first part of this zone change criterion. While it may make intuitive sense that the first portion of the criterion is

inapplicable, there is nothing in the zoning ordinance or comprehensive plan that allows an application to be exempt from a mandatory approval standard simply because the standard does not seem to apply. In this case, however, it seems apparent that the changed circumstance that precluded application of the surface mining overlay in the first place, but allows its application now, is the change in floodplain designation (Exs. 137 & 157). The Examiner heard extensive testimony about the massive environmental destruction and damage to fish habitat that results when mining is allowed in the floodplain. That damage may be the reason behind Comprehensive Plan policies 4.5.8 and 4.5.9. In any event, the redesignation of the 100-year floodplain, and the fact that this application respects the new floodplain designation, constitute a substantial change at this site that justifies consideration of a new zoning designation, in this case, the application of the surface mining overlay. This is also the justification advanced by the applicant (Ex. 57, pp 39 & 60). On this basis, the Examiner concludes that this standard is met.

Finding 19 – The applicant discusses the second part of rezone criterion 3 throughout the application materials (see e.g., Ex. 57, p 60). There is substantial evidence in the record that the resource proposed for extraction at this mine meets the specifications for construction rock that would provide a valuable resource to the county and have a benefit to its welfare. Additional aspects of the project are also reviewed in the findings that follow.

Finding 20 – groundwater and domestic wells: Issues related to groundwater are addressed in the federal environmental documents issued under SEPA, *i.e.*, the final EIS (Ex. 277, §3.5), the HCP (Ex. 276, §§3.1.3 & 3.1.4), and the RTC (Ex. 278, §3, response 12). In addition, the Examiner addresses impacts to groundwater in a separate section below. The issue of domestic drinking water wells is addressed in the FEIS (Ex. 277, §3.5.3.3, p 107), which states:

No drinking water wells have been identified downgradient of the site. However, it is Storedahl's policy to immediately respond and evaluate any report of reduced well production or well failure that may be a result of mining activities at their sites. Appropriate actions would be undertaken to repair or replace any water supply well that fails as a result of nearby mining activities by redeveloping the well, purging it of sediments, increasing its depth, or taking other necessary action, such as replacing the well.

The issue of potential impacts to residential drinking water wells is an important one. Since this is a prospective review of potential impacts, there is no compelling evidence in the record that this proposal will have any impact on wells. However, the County's approval of such permits is supposed to ensure that no such adverse impacts occur once operations begin. Therefore, the mine operator shall be responsible for responding to any complaints that its mining or processing operations have damaged an existing well, investigating repair options and repairing any damage it has caused. See Condition B-10.

The Clark County Health Department has also reviewed these consolidated applications (Ex. 367) and provided the following comments:

The water table contour map of April 2002 indicates that depths to water range in the order of 10 – 20' on the terrace east of the proposed mine. The primary water flow direction is depicted as westerly from the flat terrace downstream to the pits.

As the mining pit is excavated below the existing water table in the porous gravels and sands, neighboring shallow ground water will migrate to the open face. Over time this may lower water levels near the open face, with lesser effects further away. Presently planned mining procedures do not intend to dewater the mine pits; impacts should be minimal.

Shallow wells near the mine, obtaining water from near surface, may experience a temporary lowering of water levels. When the mine pits fill in, as the ponds or wetlands proposed, the water table should return to approximate former levels. The proposed mine as planned, is unlikely to significantly affect water use from the underlying deeper Troutdale aquifer. Near surface water from less than 18' depth should be sealed off from domestic water use, as per Washington Well Construction Guidelines.

The applicant has also provided a comprehensive analysis of groundwater impacts and a response to comments on the issue (Ex. 417). The Examiner acknowledges that shallow wells may experience a lowering of water level, but that such an occurrence is unlikely because the mine pit will not be dewatered. Moreover, shallow water, *i.e.*, water close to the surface, is not normally within zone of contribution expected to provide clean water meeting health standards. Deep drilled wells with modern well seals, should experience no effects from this mining operation. However, in the event that this mining operation lowers the water table, conditions of approval should address affected wells. See Condition B-10. On this basis, the Examiner concludes that impacts to near-by wells and groundwater will be minimal, if they occur at all, and that any impacts that might occur will be corrected by the mine operator.

Finding 21 – Noise, Dust and Aesthetics: Noise is evaluated below in Land Use Findings 28 through 32. Aesthetics are evaluated below in Land Use Finding 37. Dust is addressed under air quality in Finding 36 (air quality) below.

Finding 22 – Physical Environment and ESA listed species: The primary focus of the FEIS and HCP is to identify, discuss, evaluate and address probable impacts the proposed mining operation and subsequent reclamation/restoration activities on the ESA covered species<sup>16</sup> and their habitat. The HCP recognizes that gravel mining and processing near rivers has the potential to alter these ecological systems to detriment of the fish and other aquatic organisms that live there. The potential adverse impacts are outlined on page 6-1 of the HCP document (Ex. 276). In response to these potential impacts the applicant is proposing 18 conservation measures (CMs) to provide immediate and long-term benefits to covered species in the EFLR. Some of these CMs are designed to reduce the risk of impacts to aquatic habitat that could result from existing and future excavations. The applicant is also proposing 10 monitoring and

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<sup>16</sup> The term 'covered species' refers to the ESA listed species (steelhead, bull trout, chum salmon, chinook salmon, coho salmon, coastal cutthroat trout, pacific lamprey and river lamprey) that are covered by the ITP issued by the Services on April 21, 2004 (Exs. 410 & 414).

evaluation measures (MEMs) in the HCP by which the operator will determine whether the conservation goals and objectives are being achieved and to help identify alternative measures should the CMs not achieve the conservation goals. The CMs are fully explained in chapter 4 and summarized in chapter 6 of the HCP. The MEMs are described in HCP chapter five. The HCP (Ex. 276, §8.6, p 8-8) concludes that “the preferred alternative<sup>17</sup> would provide the most net environmental benefits, provide a supply of aggregate materials and achieve the overall project objectives.”

Ultimately, the site would be reclaimed and restored to provide significant habitat benefits. The property will be donated with a conservation easement in fee simple to a not-for-profit or public agency for inclusion in the East Fork Lewis River greenbelt currently under development. Included with the fee simple transfer will be a \$1 million endowment to provide for the maintenance of the property and insure proper management and protection of the property so that adverse effects of naturally caused events are appropriately addressed. This will add to the public welfare.

- d. Rezone Criterion 4 – (CCC 18.503.060(4): *There are adequate public facilities and services to serve the requested zone change.*

Finding 23 – The applicant addresses this criterion on page 41, 42 and 60 of the rezone narrative (Ex. 57). The Examiner concurs with this analysis and finds that the public facilities needed to serve this use are adequate, including fire protection and other basic utilities. The County’s transportation system that the proposed development plans to use is adequate and is described in detail in the transportation concurrency section, below.

Finding 24 – The Examiner finds that one of the objectives of the surface mining overlay zone is to “ensure the continued use of rock, stone, gravel, sand, earth and minerals without disrupting or endangering adjacent land uses, while safeguarding life, property and the public welfare.” (CCC 18.329.010). With proper mitigation, as specified in the conditions of approval, this proposed development meets the intent of the overlay zoning district, provides needed aggregate materials, and allows the continued construction and maintenance of the County’s transportation system.

Several opponents asserted that there was no local or regional need for the rock produced from this mine and that many other mines in the area were sufficient to supply local and regional needs. However, Mr. Storedahl testified at the April 29, 2004 hearing that, in fact, the alluvial rock produced at the Daybreak site was very high quality and that this mine accounted for more than half of the product in the north Clark County market (Ex. 580, pp 37-47). The applicant also provided testimony as to why the other mine sites suggested by the opponents were not sufficient to supply the demand in the north Clark County market (Ex. 691, pp 38-40 and App 6). Mr. Storedahl’s testimony and the other evidence in the record constitutes substantial evidence of the need for the rock produced at this mine, sufficient to meet the need criterion.

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<sup>17</sup> The ‘preferred alternative’ is the proposed mining and processing as well as implementation of the HCP as fully explained in §2.3 of the FEIS (Ex. 277).

## 2. SITE PLAN REVIEW

Following application of the surface mining overlay designation, the applicant must receive site plan approval for the specific mining operation and approval of a CUP before any extraction or processing operations can begin. The applicant's site plan application includes extraction, crushing and processing. The substantive surface mining overlay district requirements are set forth in CCC chapter 18.329, and the site plan and CUP requirements are in CCC chapters 18.402A and CCC 40.520,<sup>18</sup> respectively.

Finding 25 – Reclamation Permit: The applicant is required by state law to have a Reclamation Plan approved by the Washington Department of Natural Resources (DNR), prior to commencement of mining operations (RCW 78.44.081). See Condition A-1. A DNR SM-6 Form is required for completion of the reclamation application to DNR. Following this approval of the rezone, CUP and site plan by the Examiner, and the expiration of all applicable appeal periods without any appeals being filed, staff will review a SM-6 form for compliance with County standards.

Finding 26 – Site Area: *When the activity includes both extraction, along with any of one of the uses listed in Section 18.329.020(B)(1) – (B)(4), the total site area shall be a minimum of twenty (20) acres. (CCC 18.329.060(A)).* The “activity” described in 18.329.020(B)(4) is rock crushing. The site area is approximately 292 acres, which meets this requirement.

Finding 27 – Fencing & Setbacks: *The periphery of all sites within the gross site area being actively mined or reclaimed shall be fenced according to the State Department of Natural Resources' standards. CCC 18.329.060(C). The tops and toes of cut and fill slopes shall be set back from property boundaries according to the State Department of Natural Resources' standards for safety of the adjacent properties, and to prevent damage resulting from water runoff or erosion of slopes. CCC 18.329.060(D). These standards will be reviewed for compliance during Final Site Plan evaluation when the approved reclamation plan is submitted. See Condition A-1.*

Finding 28 – Noise Impacts: *Maximum permissible noise levels shall be according to the provisions of the Washington Administrative Code (WAC) 173-60. CCC 18.329.060(E). WAC 173-60 provides the following Maximum Permissible Noise Levels:*

7 A.M. – 10 P.M.	10 P.M. – 7 A.M.
L <sub>25</sub> = 60 dBA	L <sub>25</sub> = 50 dBA
L <sub>08</sub> = 65 dBA	L <sub>08</sub> = 55 dBA
L <sub>03</sub> = 70 dBA	L <sub>03</sub> = 60 dBA
L <sub>max</sub> = 75 dBA	L <sub>max</sub> = 65 dBA

The L<sub>25</sub>, L<sub>08</sub>, and L<sub>03</sub> are those levels exceeded 25%, 8% and 3% of the hour, respectively.

In addition to this standard, the County's noise policy under SEPA, set forth in CCC 20.50.025(1)(g), provides that:

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<sup>18</sup> The conditional use permit application is reviewed under Title 40 because of the relatively recent vesting date. There is no substantive difference between the current CUP provisions in CCC chapter 40.520 and the former provisions in CCC chapter 18.404.



*“new sources of noise (are to) be limited to the maximum environmental noise levels of WAC 173-60; even within these regulatory standards, an increase of more than five (5) decibels (dBA) over ambient noise levels at the receiving properties may be considered significant.”*

Finding 29 – Noise Impacts: The applicant submitted a noise study (Ex. 277, App. B) as demonstration that all applicable County noise standards could and would be met. Staff reviewed the study and concluded that, with appropriate mitigation, the requirements of WAC 173-60 and the Clark County SEPA policy could be met. Table 4 of the applicant's noise study (Ex. 277, App. B, p 12) shows predicted noise levels without mitigation, and indicates that, without mitigation, the noise levels at several of the receiving properties would exceed the daytime WAC standard. The applicant's Noise Study concludes that mitigation measures are required in order for this operation to meet the required standards. Those mitigation measures, presented and analyzed in the applicant's noise study (Ex. 277, App. B, pp 15-16), consist of 10 berms. The berms' dimensions are set forth in Table 5 of the Noise Study (Ex. 277, App B, p 16), and their functions are described in the narrative following Table 5.

Finding 30 – Noise Impacts: The Examiner finds that the mitigation measures described by the applicant in §11.0 of its Noise Study (Ex. 277, App. B) are necessary and, unless demonstrated otherwise, adequate for this operation to meet the applicable noise standards described above. Accordingly, compliance with these measures is required. See Conditions B-1 & B-3. The applicant shall also use “smart alarm” back-up beepers on all equipment on the site (Ex. 278, p. 301), which will help minimize off-site noise. These alarms have the ability to automatically and continuously adjust their volume level to within 5-10 dB of the background noise levels. See Condition B-2.

Finding 31 – Noise Impacts: Questions were raised by the public about truck and conveyor noise. The noise generated from on-site trucks used in the mining process was included in the noise model and predictions by summing the noise generated by the haul trucks with that generated by front-end loaders (Ex. 278, p 299). According to the applicant, the conveyor noise will be so low that it will not impact the predicted noise levels. The conveyor uses rubber belts to move rock, and the rock material does not create noise while it is moving on the conveyor belt. Any noise that is made by the conveyor usually results from a roller bearing beginning to fail or at transfer points from one belt to another. These are effectively addressed by prompt and regular maintenance of the belt system, motors, bearings and transfer boxes (Ex. 278, p 225).

Finding 32 – Noise Impacts: The effectiveness of the noise mitigation should also be evaluated through a noise monitoring program. If it can be demonstrated through that program that larger berms are necessary or that smaller berms are adequate to achieve the required maximum noise levels, then berms shall be adjusted as appropriate. This monitoring will be particularly important during Phases 1C through 4 of the mining operation because of the proximity of noise sensitive receptors (near-by homes). Noise monitoring shall take place at the beginning of each mining phase and shall be submitted for review by the County. Conditions pertaining to noise may be modified, augmented or eliminated depending upon how effective they are in achieving the required standards and minimizing or eliminating significant adverse environmental impacts. All required monitoring reports shall be submitted for review by the County, and the mine operator shall reimburse the County for the cost of its review. See Condition B-3.

Finding 33 – Hours of Operation: *Hours of operation, unless authorized by the Planning Director, shall be between 6:00 A.M. and 8:00 P.M.* CCC 18.329.060(F). The applicant addresses this issue on page 72 of the narrative (Ex. 279) by stating that mining and processing will take place only between 6:00 A.M. and 8:00 P.M. The Examiner finds that compliance with these hours will achieve this requirement. See Condition B-4.

Finding 34 – Erosion Control and Drainage: *All disturbed areas, including faces of cuts and fill slopes, shall be prepared and maintained to control erosion. This control may consist of planting sufficient in amount or type to stabilize the slope (as approved by the planning director). H. Drainage. Provisions shall be made to: 1. Prevent any surface water or seepage from damaging the cut face of any excavations or the sloping face of a hill. 2. Prevent sediment from leaving the site in a manner which violates RCW 90.48.080 and WAC 173-201-100.* CCC 18.329.060(G)&(H). These issues and the corresponding criteria are addressed by the applicant on page 77 of its narrative (Ex. 279). Compliance with these criteria is discussed by the Examiner below under stormwater and erosion control sections. Those findings are specifically adopted and incorporated herein by this reference. The applicant currently has a General Sand and Gravel National Pollution Discharge Elimination System (NPDES) general permit (Permit Number WAG-50-1359) issued by DOE for this site (Ex. 279, p 77). Discharges under this permit are an area of state regulatory authority delegated to it under the Federal Clean Water Act, and the County does not have permitting or enforcement authority.

Finding 35 – Access Road Maintenance: *Access roads to mining and quarrying sites shall be maintained and located to the satisfaction of the director of public works, to minimize problems of dust, mud and traffic congestion.* CCC 18.329.060(J). The applicant addresses this criterion on page 72 of its narrative (Ex. 279). Access to the quarry is proposed to be via the existing paved Storedahl Pit Road that intersects a county road at the bend between Bennett Road and NE 61<sup>st</sup> Avenue. There will also be the potential of trucks hauling product from east of NE 61<sup>st</sup> Avenue to the processing Area. To minimize dust on the haul road, the surface is paved. A plan to prevent any deposit or tracking of mud on public roadways shall be included in the final erosion control plan. This shall be submitted to the County for review and approval prior to final site plan approval. See Condition A-2.

Finding 36 – Air Quality: Dust and other particulate matter emissions are regulated in Clark County by the SWCAA, which has issued air quality permits for the processing equipment that Storedahl proposes to use at the Daybreak site (Ex. 332). Additionally, issues related to dust are also addressed in the FEIS (Ex. 277, p 40), which concludes that most of the resource extraction is proposed for below the water table and the material will be saturated with water. Therefore, little dust will be produced as a result of mining. The processing is covered by SWCAA permits. SWCAA has issued an *Order of Approval* for the portable rock crusher that the applicant proposes to use at the site, and the applicant has provided an inspection report for the crusher (Ex. 332). In light of the comprehensive state regulatory program, permits and enforcement, the Examiner finds that this operation will comply with the applicable air quality requirements.

Finding 37 – Aesthetics: This issue is addressed in the FEIS at §3.7.3.7 (Ex. 277, p 177). While it is likely there will be some short-term impact to the aesthetics of the area, over the long term, the aesthetic appeal of the area will improve with the site's reclamation, revegetation, wetland and riparian rehabilitation. Some areas not proposed

for mining will be planted after permits are issued. The photo simulations in the FEIS (Ex. 277, Figs 2-4 through 2-9) show that the site will be substantially revegetated and that the revegetation will improve aesthetics. The Examiner accepts and believes that the end result will be substantially similar to these photographs, this result is especially likely in light of the state permitting requirements discussed above and the County and federal oversight of the HCP and the mitigation and monitoring measures it contains.

### 3. CONDITIONAL USE PERMIT

Finding 38 – Limits of CUP Review: The need for a CUP in this matter arises solely because of the rock crushing proposed on the site. No other aspect of the proposal triggers the need for a CUP nor may any other aspect of the proposal be evaluated under the CUP criteria. Many of those operations could take place in the AG-20(S) zone as stand-alone activities without the crushing taking place. The AG-20(S) zone allows outright aggregate extraction and transport to another location for processing or sale to an end user with no further processing.<sup>19</sup> As discussed above, the Examiner has concluded that the operator has some nonconforming rights to process on site, including rock crushing. This application seeks a CUP for this activity, and if it is approved would result in the extinguishment of all nonconforming use right/claim.

Finding 39 – CUP Required Finding: *In order to grant any conditional use, the hearings examiner must find that the establishment, maintenance or operation of the use applied for will not, under the circumstances of the particular case, be significantly detrimental to the health, safety or general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the county.* CCC 18.404.060.

Uses listed as being conditionally allowed are deemed to be consistent with the underlying zoning, much as out right allowed uses, but have potential impacts that warrant mitigating conditions. The Examiner finds that rock crushing is consistent with the AG-20(S) zoning and the uses allowed in that zone, but there are impacts from crushing that require mitigating conditions to lessen those impacts. In particular, noise, dust and related impacts discussed in the preceding sections. The Examiner finds that appropriate mitigation for these impacts are also discussed under the foregoing sections and include noise limitations, limitations on hours of operation, proper installation, operation and maintenance of equipment and the construction of noise berms.

One aspect of this permit merits special discussion. Product washing and disposal of process wash water is part of the crushing operation. The applicant proposes to dispose of process wash water for at least the first three years by discharging into the existing pond system, with final discharge from Pond 5 into Dean Creek, after which it will switch to a closed-loop dry process and eliminate the discharge into the pond system. As discussed above in response to the opponents' arguments, the discharge from Pond 5 is governed by an NPDES permit that imposes certain water quality limitations. Turbidity and suspended solids are primary concerns of the opponents and the Services as well as the possibility of chemicals used in the wash process. Storedahl's past discharge exceedences gave rise to a civil suit under the Clean Water Act (Ex. 247) and settlement

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<sup>19</sup> As discussed above, processing associated with mineral extraction is encouraged by the Comprehensive Plan (Policy 4.5.18, pg. 4-18).

of that suit (Ex. 268). Over the recent past, Storedahl has used a dry process system for wash water associated with a crusher at the Daybreak site. The Services in their BO (Ex. 439, pp 59-62) expressed concern about the process wash water and the sediment load and turbidity of the discharge out of Pond 5. Quite clearly, the suspended sediments and turbidity have a detrimental effect on fish in the EFLR. Accordingly, the Examiner has modified the applicant's CM-01, proposed in the HCP (Ex. 276, pp 4-7 to 4-10) to accelerate the development of a closed-loop dry process for wash water and to prohibit the resumption of wet process waste discharges into the pond system. See Condition A-3.

On this basis, and with imposition of these and related operational conditions of approval, the Examiner concludes that rock crushing will not be significantly detrimental to the health, safety or general welfare of persons residing or working in the neighborhood or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the county. Accordingly, the CUP is approved.

#### **4. SHORELINE PERMIT**

Finding 40 – Standards for Shoreline Permit Application and Evaluation: The County's Shoreline Management Master Program applies to activities within 200 feet of the FEMA floodway and within the 100-year floodplain of the EFLR. Certain aspects of the project are proposed to be located within this jurisdictional boundary (Ex. 181), and are therefore subject to the provisions of the Shoreline Management Act (SMA) and require a Shoreline Permit. Mining is a conditional use for shoreline purposes in the rural shoreline environment. In order to be approved, shoreline conditional use developments must be consistent with: (1) Shoreline Management Master Program Element Goals; (2) Shoreline environment objectives, policies and limitations; (3) Shoreline use activity policy statements and use regulations; (4) Shoreline Development review criteria of WAC 173-27-140; and, (5) Shoreline Conditional Use Permit criteria of WAC 173-27-160. The applicant has provided a comprehensive explanation of the shoreline permit elements of the proposal (Ex. 484). The Examiner finds that the activities proposed in this application are accessory to mining activities, and, to the extent they fall within the shoreline jurisdictional limits, a Shoreline Permit is required.

Finding 41 – No mining is proposed, nor is it allowed, to take place within the shoreline jurisdiction of the East Fork Lewis River or within 75 feet of the top of bank of Dean Creek. The operations and improvements proposed as part of this development in the shoreline, and which require a permit, are accessory to mining, described in Exhibits 124 & 181 and include the following:

- Location of the storage shed, storage tank, metering compartment and mixing tank for the water quality additives (flocculants and coagulants) are in the 100-year floodplain adjacent to pond 1, but per the HCP Addendum will be removed from the shorelines area of jurisdiction prior to initiating operations at the site (Ex. 387);
- The temporary stockpiling of sediments to be used for reclamation are proposed to be located in the 100-year floodplain;
- Portions of the conveyor which cross the 100-year floodplain to transport rock from the active excavation site to the processing area;
- The pump and float system located near the edge of pond 2 to provide water to the sand classifier;

- Portions of the sand and gravel finished product stockpiles are located within the 100-year floodplain and the 200-foot shoreline management area;
- The scale house/office, truck scale and maintenance building are within the 200-foot shoreline management area;
- Portions of the site access road, Storedahl Pit Road, is within the 200-foot shoreline management area;
- Some temporary noise berms and stockpiles are within the 100-year floodplain;
- Portions of the aggregate conveyor system are within the 100-year floodplain; and,
- Fill being placed in the existing ponds on the site for reclamation purposes is within the 100-year floodplain.

At the completion of mining, all of these development activities proposed for the shoreline management area and 100-year floodplain, will be removed, with the exception of portions of the site access road.

The Master Program Element Goals that relate to this proposal are consistent with provisions of the Shoreline Management Act (RCW 90.50.100(2)); the Master Program addresses the broad elements of human activity in the shoreline area and issues that determine the quality of shoreline resources. The County's Shoreline Management Review Committee (SMRC) has reviewed the shoreline permit portions of this application and has recommended conditional approval (Ex. 407). The next several findings address the Shoreline Management Master Program Element Goals.

Finding 42 – Economic Development Element:

*Goal: To encourage the maintenance and enhancement of existing industrial and commercial activities along the shoreline in such a manner that the land-water interface be utilized for productive purposes while minimizing adverse effects to the environment; and to encourage appropriate shoreline locations for all such new developments of a water dependent nature.*

Sand and gravel mining and processing have occurred on the Daybreak site since the late 1960s, prior to the Shoreline Management Act, and Storedahl began its operation at the Daybreak site in 1987. Mining at this site by private operators, and other nearby sites by both private and public operators, has occurred because of the vast deposit of high quality gravels in and near this reach of the lower EFLR. Expansion of the mine outside of shoreline jurisdiction will cause, within shorelines jurisdiction, ancillary activities such as continued operations of the sand and gravel processing facility at the Daybreak Mine, extension of the conveyor system to transport raw material to the processing area and the development or erection of temporary noise attenuation devices as well as related reclamation activities. The applicant states that this project will result in the continued employment of approximately 40 people. Mining will not occur within shorelines jurisdiction; however, processing, reclamation and habitat enhancement will occur sequentially within the shoreline area. Once the resource available is exhausted and the site reclaimed, including the elements described in the HCP/ITP, the property will be gifted fee simple with a conservation easement, together with an endowment to manage the property in perpetuity, to a not-for-profit or public agency and included in the greenbelt being acquired to protect the EFLR.

Testimony presented to the Examiner clearly documents the high value, regional importance and fragility of the shoreline ecosystem. For that reason, the applicant initiated the federal process to obtain ITP (Exs. 410 & 415) and HCP (Exs. 276 & 394) approval from the Services and a favorable BO (Exs. 414 & 439). The development plan, program, conservation and monitoring measures negotiated between the applicant and the Services will guide mining and processing on the site as well as the reclamation activities and environmental monitoring. These measures are supposed to avoid, minimize and mitigate the adverse effects of the development on the shoreline environment, to eventually restore the site to “properly functioning conditions,” and to enhance the habitat values available. Reclamation is the stage where the existing ponds will be filled. The HCP includes 18 conservation measures and ten specific monitoring and evaluation measures in addition to an overall adaptive management process that will assure that conservation goals are achieved. These are all described in detail in the HCP and will guide mining, processing, restoration and habitat enhancement activities and ensure their effectiveness. Mining, continued processing and the other associated activities will result in a direct “land-water interface,” including the washwater pumping system and the conveyor system. However, these elements will be removed at the cessation of the mining and processing activities. There will be in-stream work conducted in Dean Creek, and potentially within the floodplain of the East Fork Lewis River. However, this work is specifically related to habitat enhancement and avulsion prevention, and plans and permits will be developed in consultation with the Services, WDFW, the Lower Columbia Fish Recovery Board (LCFRB) and Clark County.

In the short term, the activities following the HCP will result in an economically productive use of the shoreline. That use of the shoreline and 100-year floodplain, however, will not include extraction, but will involve the reclamation and replanting of the existing mining ponds. A primary objective of this development plan is to remove the excavation activities from the shoreline area and 100-year floodplain into the uplands. This relocation of the most environmentally destructive aspect of the proposal to a less sensitive area, along with the reclamation of the old mining ponds will result in a net environmental benefit in the long term. In any event, the objective of the Economic Development Element is to maintain and enhance existing commercial activities along the shoreline, which this proposal does, while minimizing the long term environmental damage, which this proposal also does. On this basis, the Examiner finds that the requirements of this Shoreline Element are met.

#### Finding 43 – Public Access Element:

*Goal: To improve the quality of existing points for public access and promote the acquisition or designation of additional shoreline areas for public access, while assuring that all such sites are appropriate and safe for public use, and that improvements and utilization will not result in detrimental effects on these natural sites or adjacent properties.*

This is a privately owned site, though some public access is allowed. Storedahl’s policy since mining activities stopped in the middle 1990’s has been to allow the public access to fish in the existing ponds and the East Fork Lewis River during periods when operations were stopped (some afternoons, evenings and weekends). In recent years, however, vandalism, illegal dumping and safety issues have arisen on the site, and the applicant has curtailed public access. Moreover, the existing mining ponds, and the

predatory fish they contain, are a detriment to the EFLR ecosystem and the native fish that live there. For the time being, it is apparent that limited or no public access to the site, with the possible exception of boating in, and fishing along, the EFLR may be compatible with the short-term use and long-term environmental restoration of the site. That being said, the long term objective of the applicant and the public and private agencies involved in this matter is the eventual closure of this mining operation, its complete and effective restoration and conveyance to a public or non-profit organization. This will eventually result in an environmentally whole, and hopefully healthy, addition to the EFLR greenbelt that is currently being assembled. With that eventual objective in mind, the public will have to live with limited access on the short term in order to achieve greater, and hopefully full, public access once this project is fully complete. The Examiner finds that this Shoreline Element does not directly relate to this application, but he also finds that its objectives will be accomplished through the full implementation of this development proposal.

Finding 44 – Circulation Element:

*Goal: To recognize existing transportation systems of shoreline areas as a means of providing access to other shoreline use activities; and, when additional circulation systems are proposed for shoreline areas, to assure that these facilities require such locations and are developed with a minimum disturbance of the natural character of the shoreline.*

The site is presently accessed from Bennett Road/NE 61<sup>st</sup> Street, which is several thousand feet east of the EFLR. No new streets or roads are proposed with this project that would improve access to this shoreline area. The plan does provide the potential for a trail to link the property with other properties within the greenbelt system. The subsequent property owner(s) may or may not decide to improve transportation facilities or facilitate access to the shoreline. In any event, the Examiner finds that this Element does not directly apply to the current proposal.

Finding 45 – Recreational Element:

*Goal: To promote the continued public acquisition of appropriate shoreline areas for recreational opportunities, and to influence development of sites in a manner which will preserve the natural characteristics of the shoreline.*

As the site is reclaimed and restored to natural and “properly functioning conditions,” the applicant is required to transfer the property with a conservation easement in fee simple, as a gift, to a not-for-profit or public agency for inclusion in the EFLR greenbelt currently under development. Concurrent with the fee simple transfer, the applicant shall also include a minimum \$1 million endowment to provide for the maintenance and management of the property. While \$1 million will not go very far toward that on-going objective, it will hopefully be a start that will help address naturally caused events and facilitate the transition to the final greenbelt status of the site. Inclusion of this property in such a public greenbelt will contribute a significant block that is critical to this important shoreline preservation program. The end result will be more and better recreational opportunities for the public and the long-term preservation of the site’s natural characteristics. On this basis, the Examiner finds that this Element is met.

#### Finding 46 – Shoreline Use Element:

*Goal: To encourage a pattern of land and water uses compatible with the character of the shoreline environments and distributed so as to avoid the undesirable concentrations of intense uses, and giving preference to uses which are dependent upon shoreline locations.*

Storedahl has requested a shoreline permit for facilities and activities accessory to mining that have been present on site and in the shoreline since before the Shoreline Management Act was adopted by the Legislature. These facilities and uses will continue to support the mining that will expand outside of the shoreline jurisdictional area. As described above and in Exhibit 181, these facilities, activities and equipment include portable crushers, sorters, a sand classifier, a wash plant, pumps and intake facilities on a float for process water, a storage shed, storage tank, parking area and access road, metering compartment and mixing tank for process water treatment additives (which will be relocated outside of the shoreline jurisdiction), a scale house/office and scale, maintenance building, and stockpiles of sand and gravel.

The EFLR channel is typically 100 to 350 feet wide and averages approximately 4 to 6 feet deep at bankfull stage. The banks typically consist of non-cohesive materials similar to the sediments found in the channel bed (sand, gravel, and cobble). The rapid reduction in river gradient through the reach downstream of Daybreak Park reduces the sediment transport capacity of the river. The reduction in sediment transport capacity results in the deposition of sediments carried from upstream sources. As a result, the valley floor is composed of alluvium dating from the Holocene epoch to the present. The alluvium consists of gravel, cobbles, sand, and silt, and ranges in thickness from several feet to 50 feet at and near the project site.

The abundance of high-quality, commercially valuable mineral resources at this location make extraction of the sand and gravel outside of the shoreline an important, economically viable and appropriate activity. The processing equipment and operations have been designed to be environmentally sensitive and will not degrade the shoreline. Moreover, the plan to fill the existing mining ponds and create forested and emergent wetlands, and to make them “avulsion ready” will ultimately blend the site with the adjacent shoreline characteristics. Finally, as mining outside the shoreline is completed and the site reclaimed, it will be transferred to a non-profit or public agency for inclusion in the EFLR greenbelt. Once ownership is transferred, the site will remain in a natural state in perpetuity. In light of this plan, and the conditions that ensure its fulfillment, the Examiner finds that the proposal meets this goal.

#### Finding 47 – Conservation Element:

*Goal: To provide for management of natural resources in shoreline areas by means which will assure the preservation of non-renewable resources, including unique, scenic and ecologically sensitive features, while allowing the sound utilization of renewable resources in a manner consistent with the public interest.*

Because no mining will take place in the shoreline area, no non-renewable resources will be removed from the shoreline. The long-existing facilities at the processing site and the limited use of temporary noise and visual buffers to be built in the shoreline area will



facilitate mining adjacent to the shoreline. This will ultimately result in the entire site, both inside and outside the shoreline jurisdiction, being converted from a predominantly monolithic pastured environment to a complex of back water ponds, wetlands and valley bottom forest. The restoration plan for the site is designed to facilitate its blending with and adding to the EFLR open space greenbelt.

The applicant proposed to place temporary washwater sediment stockpiles, noise and visual buffers within the 100-year floodplain. Staff initially recommend (Ex. 309, pp 58) that the stockpiles and noise attenuation berms be moved outside of the shorelines jurisdiction and proposed Condition A-3. Following release of the staff report (Ex. 390), the applicant clarified and documented that there would be no floodplain impacts as a result of the placement of these temporary structures (Ex. 483). Staff reviewed the new submission, agreed there would be no floodplain impacts, and recommended the deletion of Condition A-3 (Ex. 551). On this basis, the Examiner concurs that the temporary washwater sediment stockpiling and noise attenuation berms (Berms 4 & 5) will not have any floodplain impacts and do not require a separate floodplain permit.

Finding 48 – Historical/Cultural Element:

*Goal: To identify, protect and restore the cultural, historic, scientific and other educationally valuable shoreline sites and buildings and, when appropriate, to promote the acquisition of these features for public domain.*

It does not appear that this goal applies to the site. Two archaeological assessments were conducted on the project site, one in January 1997 and the other in July 1998 (Ex. 279, tab E). The first study covered approximately 20 acres of the site currently designated with the Surface Mining Combining District overlay. The second investigation covered approximately 143 acres of the balance of the project site. Both studies consulted the two tribes with historical connections to the area, viz., the Cowlitz and Chinook Tribes.

Both of the archaeological investigations included researching background documentary and historical cartographic information, as well as field reconnaissance, surface observations, and subsurface excavations. The surface reconnaissance consisted of inspecting soils exposed primarily by rodent disturbance. Only a small fraction of the site was available for inspection by this method. To supplement the field reconnaissance, both efforts included multiple shovel test probes, and the second included auger borings and backhoe pits. Both studies concluded that further archaeological investigation was not justified (Ex. 691, pp 34-37). Staff found that, to the extent this goal applies to this proposal, its requirements are met (Ex. 309, pp 49-50). The Examiner agrees.

Finding 49 – Shoreline Improvement Element:

*Goal: To encourage the restoration of degraded shoreline areas to conditions of natural environmental quality, and promote the revitalization of abandoned shoreline facilities for practical and productive activities.*

The applicant states that a primary goal of the *Daybreak Mine Expansion and Habit Enhancement Project* is to aid in the incremental return of “properly functioning

conditions” along the EFLR. As initial mining activities commence, those areas within the shoreline jurisdiction and not planned for extraction activities will be planted with native species to create a valley bottom forest. As mining progresses, the site will be sequentially reclaimed and similarly restored to forested, open water and wetland environments. Following the end of mining and processing, the processing equipment will be dismantled and the area graded, ripped, augmented with topsoil, and planted to blend with the remainder of the restored site area. Through these efforts, the site will be returned to a more natural environmental condition. The Examiner finds that, in light of the applicant’s current nonconforming use right to at least some level of extraction and processing at the site within the shoreline boundaries, the current proposal represents a significant net environmental benefit to the EFLR. Even if the current condition, including the mining ponds, is allowed to persist with no additional development, the proposal, still represents a net environmental benefit to the EFLR shoreline. The Examiner finds that the HCP, reclamation and habitat enhancement plan for the site will fulfill this goal.

Finding 50 – Floodplain Analysis Element:

*Goal: To assess the effects on floodplains and drainage corridors resulting from development of adjacent lands, and to convey the realization that floodplains are undesirable building sites, that flood control efforts are expensive and too often ineffective against anticipated future events, and to encourage a nature of land utilization in floodplains that will minimize the flood hazard, such as recreation, wildlife habitat, agricultural use, open space, pastureland and woodland.*

No mining is proposed or allowed to take place in the 100-year floodplain under the proposed development plan. The existing processing area and equipment are located above the 100-year floodplain and remained dry during the flood of record in February 1996. The additive and mixing shed are currently located in the 100-year floodplain, but will be moved to minimize risk of a contamination in the floodplain (Ex. 387). The applicant has proposed the construction of noise attenuation berms and visual buffers in the floodplain to shield the adjacent property owners from noise on the site. These structures are proposed to be temporary and will be removed at the end of mining. Because mining and processing activities will occur outside the floodplain or will be temporary, no permanent improvements are proposed or allowed that could be adversely affected by flood events. Further, because only those facilities necessary to reduce the effects of a particular phase will be constructed, there should not be any adverse off-site effects either. As stated above, the Examiner finds that the temporary washwater sediment stockpiling and noise attenuation berms (Berms 4 & 5) will not have any floodplain impacts (Exs. 483 & 551). Therefore no condition of approval is needed.

Finding 51 – General Shoreline Objectives:

*To alleviate pressures of urban expansion on prime farming land, function as a buffer between urban areas, maintain open space and allow recreational uses compatible with agricultural activity.*

The proposed project is not an expansion of urban development onto prime farming land, nor will it serve as a buffer between urban uses and farmland uses. However, part of the proposal is the application of the surface mining overlay designation to farmland,

i.e., AG-20. In fact, surface mining operations tend to discourage urban development, especially residential development at urban densities. Consequently, the proximity of this mine to near-by farmland may help to protect it from encroachment by incompatible urban development. Once mining is complete, however, the project site will be reclaimed, resurfaced, replanted and conveyed to a public or nonprofit organization for openspace purposes. Over the long run, therefore, this proposal will help prevent the urbanization of this rural area, and will eventually facilitate the recovery to a relatively natural riparian community. Under the current situation, and without approval of this project, the mine operator has the right to continue mining and processing and has no particular obligation to reclaim, replant or rehabilitate the site beyond standard mine reclamation requirements. There would also be no obligation to donate the land or preserve it as open space. Consequently, over the long term, approval of this proposal achieves this objective; whereas, denial works against it. On this basis, the Examiner finds that the objective is met.

Finding 52 – General Shoreline Policies:

1. *New Developments are to reflect the rural character by limiting density, providing permanent open space, and maintaining building setbacks from the water*

The Examiner interprets this policy as calling for land use decisions and forms of development that maintain rural areas and discourage urban forms and densities of development from encroaching into rural areas. The mechanism called for to achieve this policy is imposing setbacks and maintaining openspace buffers between shorelines and development. The County's Zoning Ordinance acknowledges that mining is a natural resource based activity and therefore one of rural character in the resource zones such as AG-20. One of the primary objectives of this proposal is to pull the mining activity away from the shoreline and out of the floodplain. This will help create openspace buffers between the upland mining activity and the shoreline. As mining and sequential reclamation and enhancement take place, the site, including the processing area within the shoreline area, will be restored to more natural conditions. Ultimately, the entire site will be transferred to a not-for-profit or public agency(s) as a permanent part of the open space greenbelt. On this basis, the Examiner finds that the proposal achieves this policy.

Finding 53 – General Shoreline Policies:

2. *Recreational access to the shorelines should be encouraged and where possible should be linked with non-motorized transportation routes.*

The current operator's policy has been to allow public access to the site to fish in the existing ponds and the EFLR during non-operational periods. During the course of mining and reclamation, access to the existing ponds will be curtailed because of safety and illegal dumping concerns. Eventually when mining is complete, the property will be resurfaced, reclaimed, replanted and restored to a riparian habitat and then transferred to a public or nonprofit agency. When that happens, and the property becomes part of the EFLR greenbelt, public access to the site and shoreline should be similar to what is presently granted through other properties in the greenbelt. On this basis, the Examiner finds that the proposal achieves this policy.

Finding 54 – General Shoreline Policies:

3. *Agricultural practices should minimize pollution resulting from pesticides, herbicides, fertilizers, erosion and feed lots.*

Agricultural practices, both within and outside the shoreline area of the site historically have been limited to livestock pasturing, hay and corn production. Benign farm practices have included little or no soil enhancement or soil conservation and have allowed invasive plant species to become established. The upland mining, processing within the shoreline area and riparian restoration activities will replace farm practices and will also help eradicate invasive plant species. The final restoration program described in the HCP and preferred alternative in the Final EIS will provide a net environmental benefit and enhancement of the shoreline area over what would otherwise happen at this site under mining or agricultural. On this basis, the Examiner finds that the proposal achieves this policy.

Finding 55 – General Shoreline Policies:

4. *Commercial and industrial development should not occur in areas of prime agricultural soil.*

The 1972 Soil Conservation Service (SCS) *Soil Survey of Clark County, Washington*, identified and mapped the following soils at the project site: Washougal loam (WaA); Washougal gravelly loam (WgB, WgE); Puyallup fine sandy loam (PuA); and cobbly Riverwash (Rc). All of these soils families have low fertility and/or low moisture holding capabilities that severely limit the choice of plants that can be cultivated or require special conservation practices, or both. Therefore, the site does not consist of prime agricultural soils. The Examiner finds that mining in the upland and processing within the shoreline area is consistent with this policy.

Finding 56 – General Shoreline Policies:

5. *Agricultural operations should be conducted in a manner which will enhance the opportunities for shoreline recreation.*

The proposal is to continue mineral resource processing within the shorelines as mining activities expand outside of shorelines jurisdiction. Existing agricultural activities will be continued in portions of the site until mining phases advance to those areas. Ultimately the site, including the processing area, will be reclaimed and restored to natural conditions and ownership transferred to a nonprofit or public agency for inclusion in the EFLR greenbelt. Recreational opportunities provided within that open space will be at the discretion of the subsequent owner(s). Because this proposal will recover the areas riparian habitats and, in the long run, maintain openspace use of the site, the Examiner finds that the proposal is consistent with this policy.

Finding 57 – Mining Policies:

1. *Adequate protection against sediment and silt production should be provided for removal of rock, sand, gravel and minerals from shoreline areas.*

While no mining will occur in the shoreline jurisdiction, accessory processing will. The existing ponds in the shoreline area were originally mined out and have since been used as settling ponds to collect stormwater and process wash water. The applicant recently switched to dry processing in 2001 but apparently wants to resume wet washing and continue using the ponds to settle fine sediments from the washwater effluent for as much as the first 3 years of operations (Ex. 277, ch 6, p 63). Wash water is initially discharged into Pond 1, which is connected by surface flow to downstream Ponds 2, 3, and 5 in series (Ex. 389). Process water and stormwater discharges to surface water and commingle with groundwater through infiltration and are covered by a general NPDES permit WAG-50-1359 (Ex. 276, Technical App. D), issued July 25, 2000 with an expiration date of August 8, 2004. The permit requires twice-monthly monitoring of the Pond 5 outlet for turbidity, monthly measurement of pH, weekly measurement of temperature, quarterly sampling and testing for total suspended solids, and quarterly reporting of results. The general NPDES permit limits pH to a minimum of 6.0 and a maximum of 9.0. Turbidity is limited to a monthly average and a maximum daily level of 50 NTUs, and total suspended solids (TSS) is limited to a monthly average of 40 milligrams per liter (mg/L) and a maximum daily level of 80 mg/L.

Turbidity standards under DOE rules do not apply to discharges into gravel ponds such as those at the project site, if they are consistent with pond reclamation. After the ponds are reclaimed, any discharges into the ponds would need to fully comply with surface water quality-based standards. Discharge from the ponds into waters of the state, such as Dean Creek, is regulated under the surface water discharge limitations outlined above.

The Examiner heard a substantial amount of testimony about the adverse effects of fine sediments in the effluent discharged from this series of ponds into the EFLR. These contaminants are most significantly measured in terms of turbidity and total suspended solids. However, turbid water also has a higher rate of solar radiation absorption, which in turn increases water temperature. All three of these water quality parameters, when high enough, have a deleterious effect on the covered fish species in the EFLR. Consequently, water quality impacts from wash water has the potential for significant adverse impacts on protected fish species. The Services, in their BO (Ex. 439, pp 59-62) expressed concern about turbidity and stated that the turbidity of Storedahl's discharge was higher than background in the EFLR and emphasized the deleterious effect of sustained elevated turbidity levels on salmonids. The HCP recognizes these deleterious effects (Ex. 276, pp 4-7 to 4-10) and proposes to eliminate wet processing within three years pursuant to CM-01.

Based on testimony received from Neal Alongi and Randy Sweet, the Examiner is less concerned about the potential toxic effects of the coagulant and flocculant chemicals used in the process wash water than he is about the suspended solids and turbidity. The Examiner finds the expert testimony of Neal Alongi, with Maul Foster & Alongi, to be particularly relevant and compelling on this issue. According to Mr. Alongi, these chemicals function by binding to fine particulate sediments. Once they are bound to fine sediments, they are no longer chemically active, but remain inert in the water column or benthic sediments. Aside from the turbidity associated with these sediments, the coagulant and flocculant chemicals appear to have no, or at most a low, toxic effect on fish species once they are bound to sediments, and comments from the Services confirm this general conclusion (Exs. 415, pp 17-18, 59-61; 267, tech app. G; 267, pp 3-63 to 3-66; 278, pp 76-80). While many of the opponents to this project raised strong

concerns about the potential toxic effects of these chemicals, the only competent expert testimony on how they actually function in this system is that of Mr. Alongi. Based on Mr. Alongi's testimony, the Examiner is relatively satisfied that these chemicals will not have a notable toxic effect. Suspended sediments, total suspended solids, turbidity and temperature, however, remain concerns.

Product washing and disposal of process wash water is part of the crushing operation. The applicant proposes to dispose of process wash water for at least the first three years by discharging into the existing pond system, with final discharge from Pond 5 into Dean Creek, after which it will switch to a closed-loop dry process and eliminate the discharge into the pond system. As discussed above in response to the opponents' arguments, the discharge from Pond 5 is governed by an NPDES permit that imposes certain water quality limitations. Turbidity and suspended solids are primary concerns of the opponents and the Services as well as the possibility of chemicals used in the wash process. Storedahl's past discharge exceedences gave rise to a civil suit under the Clean Water Act (Ex. 247) and settlement of that suit (Ex. 268). Over the recent past, Storedahl has used a dry process system for wash water associated with a crusher at the Daybreak site. The Services in their BO (Ex. 439, pp 59-62) expressed concern about the process wash water and the sediment load and turbidity of the discharge out of Pond 5. Quite clearly, the suspended sediments and turbidity have a detrimental effect on fish in the EFLR. Accordingly, the Examiner has modified the applicant's CM-01, proposed in the HCP (Ex. 276, pp 4-7 to 4-10) to accelerate the development of a closed-loop dry process for wash water and to prohibit the resumption of wet process waste discharges into the pond system. See Condition A-3.

Finding 58 – Mining Policies:

2. *Operations for the production of sand, gravel, rock and minerals should be done in conformance with the Washington State Surface Mining Act. (a) Proposals for surface mining should include plans for site reclamation. (b) State regulations should be applied to all surface mining in shoreline areas regardless of acreage or duration of the operation.*

The applicant will be required to obtain and maintain a valid reclamation permit from the DNR prior to issuance of final site plan approval. This will ensure compliance with this policy and the Surface Mining Act. The proposed plans submitted in the application and also to DNR, explain how the site will be reclaimed. These issues are discussed elsewhere in this decision. DNR is the agency charged with regulating reclamation and will apply, and require compliance with, state regulations for this project, even though no actual mining will occur in the shoreline area (Exs. 262, 306 & 337). On this basis, the Examiner finds that the proposal meets, or will meet, the requirements of this policy.

Finding 59 – Mining Policies:

3. *The removal of sand and gravel from beaches should be prohibited.*

This application does not proposed to remove sand or gravel from beaches. With that understanding, the Examiner finds that the proposal meets the requirements of this policy.

Finding 60 – Mining Policies:

4. *Removal of materials from stream banks and channels should be avoided and, when necessary, should be undertaken only with approval to the Department of Fisheries and Game.*

Again, this application does not proposed to remove sand or gravel from stream banks, channels nor anywhere else in the shoreline area. With that understanding, the Examiner finds that the proposal meets the requirements of this policy.

Finding 61 – Mining Policies:

5. *Surface mining should not occur along wooded shorelines, nor on agriculturally productive soils.*

This application does not propose mining along wooded shorelines, agriculturally productive soils, nor anywhere else in the shoreline area. With that understanding, the Examiner finds that the proposal meets the requirements of this policy.

Finding 62 – First Shoreline Development review criterion (WAC 173-27-140):

*No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless review of the use or the development is determined to be consistent with the policy and procedures of the Shoreline Management Act and the master program.*

This criterion requires compliance with the Shoreline Program's policies and procedures. This decision, the findings contained in this section, along with the conditions of approval constitute the County's fulfillment of this requirement. On this basis, the Examiner finds that this criterion is met.

Finding 63 – Second Shoreline Development review criterion (WAC 173-27-140):

*No permit shall be issued for any new or expanded building or structure of more than thirty-five (35) feet above average grade level on shorelines of the state what will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.*

No new or expanded buildings are proposed within the shoreline area under this application. Existing buildings and structures in the shorelines jurisdiction do not exceed 35 feet, and there is no evidence that they obstruct the view of a substantial number of residences on adjoining shoreline properties. Therefore, the Examiner finds that this criterion is met.

Finding 64 – First Shoreline Conditional Use Permit criterion (WAC 173-27-160):

*Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant*

*demonstrates all of the following: (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;*

The Examiner finds that the policies of RCW 90.58.020 are embodied in, and implemented through, the objectives, goals, policies and approval criteria of the Shoreline Management Act as adopted by Clark County in its Shoreline Master Program. Compliance with these various criteria necessarily means that the proposal is consistent with the policies of RCW 90.58.020. On this basis, the Examiner finds that the proposed use and development is consistent with the policies and procedures of the SMA, RCW 90.58.020 and the Clark County Master Program.

Finding 65 – Second Shoreline Conditional Use Permit criterion (WAC 173-27-160):

*(b) That the proposed use will not interfere with the normal public use of public shorelines;*

No part of the application is proposed to be on public shorelines, and therefore, this criterion is not applicable. Eventually the site, including the processing area, will be reclaimed and restored to natural conditions and ownership transferred to a nonprofit organization or public agency for inclusion in the EFLR greenbelt. On this basis, the Examiner finds that this criterion is met.

Finding 66 – Third Shoreline Conditional Use Permit criterion (WAC 173-27-160):

*(c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;*

The area is designated for Agriculture under the Comprehensive Plan and is zoned AG-20. The surrounding uses include rural residential development and some agriculture uses. The project includes changing agricultural land that is not in the shoreline to mining pits, then reclaiming that land, and transferring the entire property to a nonprofit organization or public agency for inclusion in the EFLR greenbelt open space. In light of the underlying zoning, the rezone and related land use permits approved in this decision, the Examiner finds that the project is compatible with existing and authorized uses in the area. On this basis, the Examiner finds that this criterion is met.

Finding 67 – Fourth Shoreline Conditional Use Permit criterion (WAC 173-27-160):

*(d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and*

Based on the applicant's proposal, evidence in the record, staff's favorable recommendations and the conditions attached to this decision, the Examiner finds that continued processing will not create any significant adverse shoreline impacts. In addition, processing within the shoreline area will continue similar to what existed prior to adoption of the SMA and Clark County Shoreline Master Program but with a reduced negative impact on water quality because of the requirement that the applicant continue dry processing. Maintenance of water quality is critical to the long-term health of covered fish species in the EFLR, and, in the Examiner's view, dry processing is the only



way to conclusively and consistently prevent discharges from the site that could significantly adversely impact water quality. Quite clearly, the suspended sediments and turbidity have a detrimental effect on fish in the EFLR. Accordingly, the Examiner has modified the applicant's CM-01, proposed in the HCP (Ex. 276, pp 4-7 to 4-10) to accelerate the development of a closed-loop dry process for wash water and to prohibit the resumption of wet process waste discharges into the pond system. See Condition A-3. With this condition, full implementation of the mitigation measures in the HCP, final restoration of site and conveyance to a nonprofit or public agency is the only way to ensure that the operation will not adversely effect the shoreline environment. On this basis, the Examiner finds this criterion is met.

Finding 68 – Fifth Shoreline Conditional Use Permit criterion (WAC 173-27-160):

*(e) That the public interest suffers no substantial detrimental effect.*

This proposal is for a mining operation on private property. In this light, the Examiner finds that the public interest is protected by a complete application of the Shoreline Management Act, the County's Shoreline Master Program and all of the goals, policies and criteria of that program. In light of the foregoing findings of compliance with these goals, policies and criteria, the Examiner finds that approval of this shoreline permit will protect the public interest, and that interest will not suffer substantial detriment, so long as the applicant/mine operator fully complies with the requirements of the HCP, ITP and all conditions of this approval, including Condition A-3, which modifies CM-01 to require closed-loop dry processing and prohibits wet processing at this site.

## **5. WETLAND & OTHER PERMIT ISSUES**

In addition to the foregoing land use approvals, this project requires specific permits related to wetland fills, archaeology, and riparian habitat permit. This section sets forth the Examiner's findings with regard to each.

### **ARCHAEOLOGY:**

Finding 1: Archaeological assessments were conducted on the project site, the first in January 1997 by Davis of J. & J. Enterprises and the second in 1998 by David DeLyria of Archaeological Services of Clark County (Ex. 279, tab E). The first study included 20 acres of the site currently designated with the Surface Mining Combining District overlay, and the second investigation covered approximately 143 acres of remainder.

Finding 2: Both of the assessments included researching background documentary and historical cartographic information, as well as field reconnaissance, surface observations, and subsurface excavations. The surface reconnaissance consisted of inspecting soils exposed primarily by rodent disturbance. Only a small fraction of the site was available for inspection by this method. To supplement the field reconnaissance, both efforts included shovel test probes, and the second included auger borings and backhoe pits. Both reports have been submitted to the county and are in the archaeological staff's office. These reports are exempt from public inspection per RCW 42.17.310.

The investigations identified few archeological artifacts. The 1997 Davis study uncovered occasional fire-cracked rocks, which were believed to be of natural origin, and a few pieces of porcelain and glass. The 1997 study concluded that:

“As expected, no prehistoric sites or objects were identified within the protected area ... Based on the type of materials found and the information from the current property owner, I would recommend that this not be considered as a significant cultural resource because it does not appear to meet the criteria for the National Register of Historic Places. The remains lack the integrity necessary to qualify for the NRHP. They have been subjected to fire, plowing and removal as trash ...”

Ex. 279, tab E, p 30.

Similarly, the 1998 investigation yielded a few obsidian flakes and several cryptocrystalline flakes of multiple colors, and concluded that:

“Additional field studies at the project area are unlikely to yield any significant new data. Archeological Services of Clark County concludes that no further archaeological work is necessary at the Storedahl Daybreak Mine project area.”

Subsequently, the Washington Office of Archaeology and Historic Preservation (“OAHP”) wrote to County staff questioning whether the prior two studies were adequate (Ex. 635) and stating that OAHP did not have enough information to determine where there would be significant impacts to archaeological resources. David DeLyria responded (Ex. 678) and corrected several factual errors, clarified that only 2 acres of the proposed project area that would be subject to disturbance had not been surveyed, and concluded that:

“It is my professional opinion that ASCC's survey design was appropriate and the subsequent radial sampling was likewise appropriate. It is my professional opinion that additional field studies at the project area are unlikely to yield any significant new data. Nevertheless, in the event that archaeological material is encountered during the proposed project, Stordahl [sic] would immediately notify an archaeologist and halt work in the vicinity of the finds until they can be inspected, assessed and appropriate action is taken.”

Ex. 678.

Following its review of the archaeological survey reports and the letter from Mr. DeLyria, OAHP responded (Ex. 695) with specific criticisms of the surveys and recommended a condition of approval, at the applicant's suggestion, that the unsurveyed 2-acre portion of the site be surveyed. The Cowlitz Tribe, which had previously joined OAHP in recommended additional survey work (Ex. 690), and then withdrew its opposition based on the suggested condition (Ex. 698). The applicant concludes with the offer of further survey work covering the 2-acre portion of the site that not previously been surveyed (Ex. 699). The Examiner concurs and finds it appropriate to impose a condition requiring completion of the survey work and, upon

the discovery of archaeological material, a halt to all mine operation in the vicinity of the find. See Condition A-11.

#### **WETLANDS:**

Finding 1: The US Army Corps of Engineers has verified the wetland boundaries as reported in the December 1998 revised wetland delineation report prepared by Ecological Land Services, Inc. (Exs. 346 & 279, App B). The site contains two Category 4 wetlands (labeled B and D) and two Category 3 wetlands (labeled A and C). Buffers were determined by staff to be 25 feet for Category 4 and 50 feet for Category 3 wetlands in March 1999 (WPD98024, Ex. 129). This finding was based on an incorrect application of CCC 13.36.340(5), however, because no land division is proposed in this application. However, the wetland predetermination was binding upon the county at the time the site plan review and preliminary wetland permit applications were vested under CCC 13.36.210. According to the "Alt-B Preferred Alternative" Final Site Plan (Ex. 277, Fig 2-3), there are no impacts proposed within the wetland 50-foot buffers for the Category 4 wetlands or within the 100-foot buffers for the Category 3 wetlands that would normally be applied. Therefore the error in identifying the appropriate wetland buffers in the initial buffer determination in WP98024 does not appear to have had any legal or practical effect.

Finding 2: Wetland B will be destroyed by mining activities in Phase 6. This will result in 0.25 acres of impact to a Category 4 wetland. The applicant proposes to create a total of 82 acres of forested and emergent wetlands through the completion of the proposed reclamation plan and HCP (Ex. 276). A minimum of 0.38 acres of this work must be completed within 1 year of initiating Phase 6. The applicant proposes to initiate reclamation as each phase is completed. However, without a clearly defined mining schedule that identifies wetland impacts, verification that adequate wetland mitigation has been or will be completed prior to initiation of Phase 6 is required. See Conditions B-5 and C-1.

Finding 3: The requirement for a Conservation Covenant prior to Final Site Plan approval cannot be waived or varied. See Conditions B-6 and E-1. However, the covenant can be worded so as to protect wetlands and wetland buffers that will not be directly affected by the project while still allowing mining and reclamation activities as proposed in the approved site plan. Based upon the development site characteristics and the proposed development plan, staff concluded that the proposed site plan and preliminary wetland permit met the requirements of the Wetland Protection Ordinance so long as recommended conditions of approval were required (Exs. 309, 310 & 390 pp 56-57). The Examiner agrees and approves the wetland permit on that basis, subject to Conditions B-5, B-6, C-1 & E-1, and finds that the requirements for preliminary plan review for wetlands are satisfied.

#### **HABITAT:**

Finding 1: The county has reviewed this application, including the Final HCP and Final EIS, for compliance with the County's Habitat Conservation Ordinance (HCO) CCC chapter 13.51. Based on staff site inspections and the Clark County GIS mapping indicators, there are two riparian Habitat Conservation Zone's (HCZ's) on the property. The riparian designations are based on the watercourses associated with Dean Creek and the EFLR. The EFLR is classified as a DNR type 1 waterway in this area. According to CCC Table 13.51.050, a DNR type 1 watercourse requires a 250-foot riparian HCZ to protect fish and wildlife habitat. The riparian HCZ

extends outward from the ordinary high water mark 250 feet on either side or to the edge of the 100-year floodplain, whichever is greater. In this case, the 100-year floodplain is greater. Dean Creek, a DNR type 3 watercourse, flows along the northwestern property line. A DNR type 3 watercourse requires a 200-foot riparian HCZ. Finally, a Washington Department of Fish and Wildlife (WDF&W) mapped Priority Species area (large concentrations of waterfowl) exists just southwest of the site along the EFLR.

Finding 2 – With the exception of two temporary noise attenuation berms (Ex. 277, Fig 3-28) and a temporary washwater sediment stockpiling area (Ex. 181, Fig 3), the Daybreak Mine expansion is located outside of the EFLR 100-year floodplain, as shown on the applicant's Final EIS (Ex. 277, Fig 2-3). Therefore, most of the project is beyond the jurisdictional boundaries of the riparian HCZ for the RFLR, as defined in the HCO. The two temporary noise attenuation berms will be constructed and in place during Phase 2 of mining. Following release of the staff report (Ex. 390), the applicant clarified and documented that there would be no floodplain impacts as a result of the placement of these temporary structures (Ex. 483). Staff reviewed the new submission, agreed there would be no floodplain impacts (Ex. 551). On this basis, the Examiner concurs that the temporary washwater sediment stockpiling and noise attenuation berms (Berms 4 & 5) within the 100-year floodplain will not have any floodplain impacts and do not require a separate floodplain permit.

Finding 3 – In contrast to the minor encroachments described above, the proposed project is within the 200-foot riparian HCZ of Dean Creek. The quality of the riparian habitat is fair within the inner 50 feet of the Dean Creek riparian HCZ, while the outer 150 feet is significantly degraded because of intensive farming. Hence, the habitat quality and functionality of most of the riparian HCZ is poor, especially relative to terrestrial wildlife functions. The applicant proposes initial mining within 75 feet of Dean Creek, which would then end after a few years with restoration of the 200-foot riparian HCZ (Ex. 277, Fig 2-3). The proposed restoration calls for a mix of native plantings and emergent wetland creation, with the intent of buffering Dean Creek from the adjacent mining, allowing Dean Creek more channel migration potential, enhancing the surrounding fish and wildlife habitat, and minimizing the risk of Dean Creek flowing into one the mining ponds. CCC 13.51.080 (2)(a) requires all proposed land use activities to “substantially maintain the level of habitat functions and values” currently present on the site. Although the majority of the project complies with the HCO, previous staff reviews of earlier versions of the draft HCP and draft EIS identified concerns regarding the interception of hyporheic flow linked with Dean Creek and the potential constriction of the Dean Creek channel migration zone (Ex. 205). In response to these issues, the applicant provided additional evidence that shows the project will not impair these functions (Ex. 483).

In particular, the applicant provided an analysis of these functions and described how the project will maintain Dean Creek hyporheic flow and channel migration capabilities. In the FEIS (Ex. 277, §3.5.1.1, pp 93-94), the applicant documented that the hyporheic zone of Dean Creek does not extend into the proposed mining area. Furthermore, the FEIS states that the 200-foot wide restored riparian HCZ will allow channel migration of Dean Creek, beyond what is currently present (Ex. 277, §2.3.4, p 39). Based on this evidence, the Examiner concludes that the applicant has met its burden of showing the proposed project will not impair aquatic habitat functions associated with Dean Creek.

Finding 4 – The applicant also supplied evidence that the terrestrial wildlife functions currently present in the farm pasture adjacent to Dean Creek will be maintained adequately and mitigated through the habitat enhancement and restoration process (Ex. 276, table 4-1 & Ex. 277, fig 2-3). The applicant proposed a substantial reforestation plan adjacent to pockets of created open water and emergent wetlands, such that a diverse mosaic of wildlife habitat will result (Ex. 277, fig 2-3). Based on a favorable staff report, the Examiner finds that this mitigation will be a substantial improvement over the existing terrestrial wildlife habitat present in these primarily agricultural areas and an improvement over what would exist if the applicant continued mining the site under its nonconforming use right. Even though the applicant proposes substantial monitoring and reporting as a component of the reclamation plan (Ex. 276, table 5-1) under its HCP (Exs. 276 & 394) and ITP (Exs. 410 & 415) approved by the Services, there is no proposed feedback-loop that involves county review. Given that compliance with the HCP is a requirement of these consolidated land use permits (Condition B-1), the Examiner concludes that county review of the monitoring data and analysis is required to assure compliance with the County's approval criteria for these permits. Therefore, the Examiner will require the applicant to submit monitoring data and progress reports to county staff for review and verification. See Condition B-7. On this basis, the Examiner finds that the applicant has demonstrated compliance with the County's Habitat Conservation Ordinance, CCC chapter 13.51.

#### **TRANSPORTATION:**

Finding 1: Transportation engineering staff has reviewed the traffic study (Ex. 277, App A) and the applicant's operating conditions update (Ex. 376) for the proposed Daybreak Mine development consisting of an expansion of existing operations to include 8,000 tons exported per day and 4,000 tons mined per day under peak conditions. The proposed development is located on the existing Daybreak Mining facility west of NE 61<sup>st</sup> Avenue and south of NE Moore Road.

Finding 2: The applicant has evaluated two alternatives (Ex. 277, pp 162-166). Alternative 1 will transfer mined material along the site by using a conveyer. Alternative 2 will use 30-ton trucks to transfer mined material around the site. The applicant's traffic study estimates the increased trips from the proposed development by using trips from the existing facility as a basis for the trip generation. For Alternative 1, the number of increased trips is estimated at 23 AM peak-hour trips and 12 PM peak-hour trips. For Alternative 2, the number of increased trips is estimated at 28 AM peak-hour trips and 30 PM peak-hour trips.

#### **CONCURRENCY:**

Finding 1: CCC chapter 12.40 (Transportation Concurrency) requires a traffic study to be completed for developments generating 10 or more peak hour trips on an arterial/collector segment or intersection. The level of service (LOS) at the intersections being impacted by the proposed developments shall generally be maintained at a D LOS or better. The intersection of NE Daybreak Road and NE Hyatt Road shall be maintained at a LOS C or better.

Finding 2: The applicant conducted a traffic impact analysis for the proposed development (Ex. 277, App A) and determined the level of service at the following intersections within one mile of the site:

- NE 279<sup>th</sup> Street and NE 82<sup>nd</sup> Avenue
- NE Daybreak Road and NE Hyatt Road
- NE Bennett Road and NE 61<sup>st</sup> Avenue (site access)
- NE 284<sup>th</sup> Street and NE Moore Road

The applicant's traffic study indicated that these intersections would continue to operate at an acceptable LOS at build-out of the proposed development and that none of these intersections would degrade to a failing LOS. On this basis, the Examiner finds that the proposed development complies with the Concurrency Ordinance CCC chapter 12.40.

Finding 3 – Safety: Where applicable, a traffic study shall address the following safety issues:

- Traffic signal warrant analysis;
- Turn lane warrant analysis;
- Accident analysis; and,
- Any other issues associated with highway safety.

Mitigation for off-site safety deficiencies may only be a condition of approval on development in accordance with CCC 12.05.230, which says that “nothing in this chapter shall be construed to preclude denial of a proposed development where off-site road conditions are inadequate to provide a minimum level of service as specified in Chapter 12.41 CCC or a *significant* traffic or safety hazard *would be caused or materially aggravated* by the proposed development: provided that the developer may voluntarily agree to mitigate such direct impacts in accordance with the provisions of RCW 82.02.020.”

Finding 4 – The accident rate at the subject intersections is below 1 accident per million entering vehicles; therefore, the County does not consider these intersections to be high accident locations and further analysis by the applicant is not warranted. There does not appear to be any safety issues that would worsen due to this proposed development. No conditions of approval are required with respect to safety.

## **ROAD STANDARDS:**

Finding 1 – Applicability: This development was vested September 15, 1998, and is subject to the Clark County Road Standards in CCC chapter 12.05, which were in place at the time of vesting. See Condition A-4.

Finding 2 – The various offsite roads that provide access to this development all meet or exceed the offsite road requirements specified in CCC 12.05.303(2). This project is subject to the Transportation Concurrency Management Codes (CCC chapter 12.40), which are discussed elsewhere in this decision.

Finding 3 – This site currently accesses the county roadway system at the intersection of NE 61<sup>st</sup> Avenue and NE Bennett Road. The applicant has provided evidence that this access meets the sight distance requirements of CCC 12.05.360. Except as discussed below, the applicant shall continue to use this point as the only entrance to the site. See Condition B-8. Existing drives that serve residences on the site may continue to be used.

Finding 4 – The applicant proposes mining areas east of NE Bennett Road and NE 61<sup>st</sup> Avenue. Material mined from this area is to be transported across these county roads either by truck or conveyor belt to the processing area. The applicant shall obtain approval of a Road Approach Permit for any new access points to the area east and for any new access points west of these roads. See Condition A-5. The applicant shall coordinate with, and obtain approval from, Clark County Public Works for any conveyor belt crossing the county road. See Condition A-6.

Finding 5 – Based on the development site characteristics, the proposed transportation plan, the requirements of the County's transportation ordinance, and the findings above, the Examiner concludes that the proposed preliminary transportation plan, subject to the above-mentioned conditions, meets the requirements of the county transportation ordinance (CCC chapter 12.05) that was in place at the time of vesting.

**STORMWATER, GROUNDWATER, SURFACE WATER & EROSION CONTROL:**

Finding 1 – Stormwater and Erosion Control, applicability: Stormwater management at this site is regulated under DOE's National Pollutant Discharge Elimination System (NPDES) Sand and Gravel General Permit and State Waste Discharge General Permit (WAG-50-1359). As part of the permit requirements, the site operates under a stormwater pollution prevention plan, erosion and sediment control plan, monitoring plan and spill plan. The entire 292-acre site will be covered under an updated and modified DNR surface mining permit and reclamation plan. Regulation of stormwater discharge under the NPDES and Waste and Discharge Permit and related plans will continue as long as mining and processing takes place at the site, and until final reclamation and habitat enhancement activities have been completed. The reclamation of the site must meet criteria under the Surface Mining Act and will be subject to a bond to insure reclamation is fully implemented once mining is completed.

Former CCC chapter 13.25, regulating stormwater and erosion control at the time this application vested, applies to this project. That chapter provides that any development or redevelopment that results in 5,000 sf or more of new impervious area within the rural area is subject to the ordinance's requirements. It appears that the proposed Daybreak mine proposal will create at least 5,000 sf of new impervious area, e.g., the construction of a new haul road would achieve this level (Ex. 550). Therefore, during the mining and reclamation operation, the above-mentioned state permits shall govern the stormwater management and erosion control at the site in addition to the provisions of CCC chapter 13.25. While portions of the site may be conveyed to other entities following final reclamation, those areas will still be subject to CCC chapter 13.25, the stormwater and erosion control ordinances in place at time of vesting. See Condition B-9.

Finding 2 – Groundwater: Based on the FEIS (Ex. 277) and the Final HCP (Ex. 276), it appears that the past mining operations have not resulted in adverse impacts on groundwater. HCP Chapter 3 discusses the existing conditions of the Daybreak Mine site and the EFLR basin generally. The chapter includes information on the hydrology of the EFLR, Dean Creek, the existing Daybreak ponds, and the local groundwater system. The HCP also describes the connections between surface water and groundwater within the project site. The applicant has also performed

collected hydrological data on the site for many years, analyzed that data, and monitored groundwater elevations at various locations, e.g., at drinking and irrigation wells. Based on this information, the Examiner finds that the mining operation to date has not resulted in any interruption of the hydrological system at the local scale.

The applicant has provided data of groundwater elevation monitoring data at various locations, including seven drinking wells and one irrigation well. In addition, 3 piezometers around the site have been monitored and the results reported in the HCP (Ex. 276, Fig 3-11) and the FEIS (Ex. 277, §3.5). This material indicates that the existing Daybreak ponds do not drain the aquifer or significantly alter the direction of groundwater flow. In light of groundwater quality concerns, the applicant shall continue to monitor groundwater. CCC 13.25.210(6)(d) specifically authorizes the County to require a groundwater monitoring program on commercial and industrial sites where infiltration is allowed and there is a significant risk of groundwater contamination. The Examiner finds that such a risk exists here sufficient to justify such a monitoring program. In the event groundwater contamination is detected, the applicant shall be responsible for full mitigation. See Conditions A-7 & B-10.

Finding 3 – Surface Water Temperature: Currently, the EFLR is listed on the State's 303(d) list as water-quality limited due to elevated water temperatures. Summer temperatures sometimes exceed 72° F at Daybreak Park, just upstream from the HCP area. Based on this report, the existing ponds become thermally stratified in summers and temperatures sometimes exceed 68° in the upper layers. A review of additional information in the HCP does not demonstrate that the past mining activities have caused an increase in surface water temperatures in the EFLR.

Finding 4 – Grading: Grading is reviewed under Appendix Chapter 33 of the 1997 Uniform Building Code. Mining, quarrying, excavating, processing or stockpiling of rock, sand, gravel, aggregate or clay, where lawfully established, are exempt from this chapter, so long as those operations do not affect the lateral support or increase the stresses in or pressure upon any adjacent or contiguous property. See §3306.2(2) of UBC chapter. Because these activities are lawful and will be performed under these permits, the Examiner finds that the Grading Code does not apply to this project, and a separate permit is not required.

Finding 5 – Floodplain: The applicant indicates that all extractive mining activities will be outside of the 100-year floodplain & floodway boundaries according to FEMA's revised 100-year floodplain maps and adopted by Clark County, effective July 19, 2000 (Exs. 137 & 157). Compliance with the revised FEMA 100-year floodplain and floodway maps and a prohibition against extraction in these areas shall be a condition of approval. See Condition B-11.

Finding 6 – Floodplain: The applicant proposes construction of sound berms at various locations on the site, some of which may be located in the floodplain. Staff determined that these will have insignificant effect on the hydraulic characteristics of the EFLR (Ex. 551). On this basis, the Examiner finds that a floodplain permit is not required for berm construction.



## **FIRE PROTECTION:**

Finding 1 – This application was reviewed by the Fire Marshal's Office which provided comments and recommended conditions of approval (Ex. 79). All work done at this site under these consolidated county land use approvals shall comply with the conditions recommended by the Fire Marshal's Office. See Condition A-12.

Finding 2 – Building construction under these consolidated permits shall be performed in accordance the county's building and fire codes. Additional specific requirements may be imposed at the time of building construction as a result of the permit review and approval process. See Condition B-12.

Finding 3 – Fire apparatus access is required for this application. The roadways and maneuvering areas as indicated in the application adequately provide required fire apparatus access. The applicant must continue to ensure that fire apparatus access roads maintain an unobstructed width of not less than 20 feet and an unobstructed vertical clearance of not less than 13.5 feet, with an all weather driving surface and capable of supporting the imposed loads of fire apparatus.

## **V. SEPA Determination and Appeals:**

This consolidated set of applications began in 1998 when Storedahl applied for a rezone, comprehensive plan map amendment, site plan review, wetland and habitat permits. Planning staff initially determined that the project would have probable significant environmental impacts and issued a determination of significance (Ex. 94) under Washington's State Environmental Policy Act (SEPA). This required the compilation of an environmental impact statement. Concurrently, Storedahl was working with the Services to obtain take coverage under the Endangered Species Act by obtaining an ITP (Exs. 410 & 415) and HCP (Exs. 276 & 394), a favorable BO (Exs. 414 & 439) and a wetland fill permit, all of which required an EIS under NEPA. The applicant elected to follow the federal NEPA process and use the NEPA documents to satisfy the separate, but parallel, requirements of SEPA. The County agreed to this approach (Exs. 281 & 341) as under the authority of CCC 20.40.030 and WAC 197-11-610(3).

A draft EIS was compiled and circulated by the Services for public and agency comment (Ex. 145). Initial comments were received in response to the DEIS from the public and private interest groups (Ex. 154, 166, 191, 196, 197, 206, 207, 215, 216, 217, 218, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 237, 246, 249, 254, 256, 257, 259, 261, 269, 272 & others) and from governmental agencies (Exs. 165, 217, 258, 260 & 262). The County also contracted with outside experts to review and comment on the DEIS (Exs. 148, 149, 152, 153 & 172). The Services published a notice of intent to prepare the FEIS in the Federal Register on December 27, 1999 (Ex. 150). On November 19, 2002, the Services jointly issued notice of the proposed ITP (Ex. 248) and notice of the public comment period was issued (Exs. 252 & 253).

Over the course of several years, and in the midst of the above-mentioned stream of correspondence and comments, the FEIS and HCP were prepared and finally released for public comment on December 29, 2003 (Exs. 276 & 277). At the same time, the Services released a comprehensive response to all of the comments received on the draft documents (Ex. 278) and the applicant released a complete and revised site plan including all supporting environmental documentation (Ex. 279). On January 26, 2004, NOAA Fisheries issued a separate notice and invitation to comment on the HCP

(Ex. 301). Meanwhile, the County and the Services continued to receive comments on the environmental documents from the public (Exs. 290, 291, 292, 300, 302, 303, 304, 305, 307, 318, 319, 320, 321, 322, 323, 324, 325, 330, 333, 335 & 336) and from various governmental agencies (Exs. 289, 306, 308, 311 & 337). County wetland and habitat biologists also provided comments on the revised and final environmental documents (Exs. 309, 310 & 312). On February 4, 2004, the County's ESA Advisory Committee provided comments to the Examiner recommending that no more mining be allowed in or near the EFLR and that the Examiner deny any request for a zone change or site plan that would allow any mining activities in or near the EFLR (Ex. 316).

On December 31, 2003, the County issued notice that it was accepting the federal FEIS and related environmental documentation in satisfaction of the parallel SEPA requirements attendant to the rezone application (Ex. 281). On January 12 & 14, 2004, Friends of the East Fork and Scott Rose, respectively, filed appeals of the County's SEPA decision related to the rezone (Exs. 287 & 288, respectively). On March 1, 2004, the County issued notice that it was accepting the federal FEIS and related environmental documentation in satisfaction of the parallel SEPA requirements attendant to the CUP application (Ex. 341). On March 12 & 15, 2004, Friends of the East Fork and Scott Rose, respectively, filed appeals of the County's SEPA decision related to the CUP (Exs. 344 & 345 respectively). In all, four SEPA appeals were filed by two parties (Exs. 287, 288, 344 & 345).

Four separate SEPA appeals were filed by two parties (Friends of the East Fork and Scott Rose) challenging the County's two SEPA determinations, *i.e.*, the County's decisions to adopt the federal NEPA documents as the County's fulfillment of its obligations under SEPA for the rezone application (Ex. 281) and the CUP proposal (Ex. 341). The Examiner adopts the following findings in response to the SEPA appeal issues raised by the Friends of the East Fork in its appeals (Exs. 287, 344 & 582) and then the appeal issues raised by Scott Rose (Exs. 288, 345 & 404). At the end of this section the Examiner concludes that there are likely significant adverse environmental impacts shown in the environmental record, but that reasonable measures are available and are sufficient to mitigate those impacts. On that basis, the Examiner denies all of the SEPA appeals.<sup>20</sup>

**A. Friends of the East Fork appeals (Exs. 287 & 344):**

**First Appeal Issue (rezone): *The County cannot adopt the FEIS documents because the federal NEPA process and those documents are not yet final. By attempting to adopt a document that is still open to public comment at the federal level, the County has attempted to circumvent the public processes that are an integral part of NEPA and SEPA.***

It is important to understand that these appeals were filed relatively early in the County's land use process, while the federal NEPA documents were still subject to public comment and revision and were not yet final. Relevant to this argument, CCC

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<sup>20</sup> To the extent that opposition arguments to the underlying land use permits are addressed in the following sections in response to SEPA appeal issues, the Examiner adopts the same as findings in support of his conclusion that the arguments are not sufficient to deny the requested permits.

20.40.030 specifically authorizes the County to satisfy its SEPA requirements by adopting federal NEPA documentation; although, the code provision does not address the specific issue of a non-final federal document that is raised in this appeal:

*The county may use any environmental analysis prepared under NEPA to satisfy requirements of SEPA, subject to the limitations of WAC 197-11-610. In particular, either a NEPA environmental assessment or a NEPA EIS may be adopted as a substitute for preparing a SEPA EIS.*

CCC 20.40.030.

WAC 197-11-610(3)<sup>21</sup> specifically authorizes the County to adopt an existing EIS prepared under NEPA as a substitute for a separate EIS prepared under SEPA, but with several caveats. None of the caveats discuss the timing of the adoption, except that a federal EIS may not be adopted as compliance for SEPA if it has been found inadequate. In this particular case, the federal EIS has not been found to be inadequate. Moreover, in the interval since these SEPA appeals were filed (January 13 and March 11, 2004 respectively), the federal NEPA process has been completed; the federal NEPA documents are now complete, and the EIS has been supplemented with an addendum to the HCP (Ex. 394).

The completion of the federal process followed the required public notice and comment procedures required by NEPA, and, the record shows that the services kept the public informed about the possibility that the federal NEPA documents might be adopted by the County in partial fulfillment of its obligations under SEPA (Ex. 248). Scoping for the SEPA DEIS was initiated on October 8, 1998 (Exs. 93 & 94). The final scoping focus was prepared November 13, 1998 (Ex. 113). The applicant submitted a draft scope and allocated responsibilities in early 1999. The County contracted with Rich Hines, a retired employee with extensive environmental regulatory experience, to conduct an outside independent review of the DEIS (Ex. 155). The applicant submitted the DEIS to the County in September 1999 (Ex. 145). Notice of the DEIS sent by the services went beyond what was required by federal law, met the notice requirements of SEPA (Exs. 252 & 253), and provided a total of 92 days for public comment on the DEIS. The County also contracted with fisheries biologist Greg Koonce of Inter-Fluve, Inc. and Adolfson Associates to provide additional review of the DEIS (Exs. 148, 149, 152 & 153). The applicant prepared and submitted a revised second DEIS in August 2000, and the County obtained additional comments on this draft (Ex. 172). After these revisions, the County reviewed public and governmental comments, and the services

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<sup>21</sup> WAC 197-11-310(3) provides that an agency may adopt a NEPA EIS as a substitute for preparing a SEPA EIS if:

- (a) The requirements of WAC 197-11-600 and 197-11-630 are met (in which case the procedures in Parts Three through Five of these rules for preparing an EIS shall not apply); and
- (b) The federal EIS is not found inadequate: (i) By a court; (ii) by the council on environmental quality (CEQ) (or is at issue in a predecision referral to CEQ) under the NEPA regulations; or (iii) by the administrator of the United States Environmental Protection Agency under section 309 of the Clean Air Act, 42 U.S.C 1857.

issued a DEIS under NEPA on November 22, 2002. After additional notice, public comments and analysis of those comments, the services issued the FEIS on November 28, 2003 (Ex. 277), along with the Final HCP (Ex. 276) and final response to all comments (Ex. 278).

The Examiner interprets this first appeal issue as purely procedural. To prevail, the appellant must demonstrate that a procedural error actually occurred and that the error prejudiced its substantial rights, *i.e.*, that the error was not harmless. In resolving this appeal issue, the Examiner has the luxury of hindsight and a federal, state and local process that is complete except for pending appeals. What, at the time, may have been a non-final set of NEPA documents when these SEPA appeals were filed is now final. Nothing in state SEPA law, federal NEPA law or the local code precludes the County from announcing its intention to adopt non-final federal NEPA documents in fulfillment of SEPA requirements. Consequently, at the time the County issued the challenged SEPA decisions, those decisions were lawful. The passage of time and the completion of the NEPA process have only confirmed the legitimacy of those decisions. Accordingly, the Examiner finds that the County committed no procedural error – harmful or otherwise – in these decisions. Even if it was error to announce the adoption of the federal NEPA documents prior to their being final, that error was harmless in light of the fact that they are now final. On this basis, the Examiner rejects the Friends of the East Fork’s first appeal argument.

**Second Appeal Issue (rezone): *The County has not taken the steps necessary to properly adopt the FEIS as a SEPA document. WAC 197-11-630(1) requires that an agency adopting an existing environmental document “must independently review the content of the document and determine that it meets the adopting agency’s environmental review standards and needs for the proposal.”***

In this appeal argument, Friends of the East Fork asserts that the County erred by adopting the federal NEPA documentation without first conducting an independent review of the DEIS. The record says otherwise. Clark County engaged expert, outside, independent review of the DEIS, and the result of those reviews are in the record (Exs. 148, 149, 152, 153 & 172). The County’s staff wetland and habitat biologists also reviewed and provided comments on the DEIS (Exs. 309, 310 & 362). The County’s ESA Advisory Committee also reviewed and provided comments on the DEIS, albeit recommending denial of the applications (Ex. 316). Finally, the County provided comprehensive comments to the services on the DEIS (Ex. 255) that incorporated these reviews, and planning staff synthesized all available comments in a comprehensive analysis of the project and its environmental impacts (Ex. 390). Based on the procedural history of this proceeding, which is well documented in the record, the Examiner rejects Friends of the East Fork’s second appeal issue. The Examiner finds that the County performed an independent and thorough review and analysis of the DEIS and other environmental documents in this matter as required by WAC 197-11-630(1).

**Third Appeal Issue (rezone): *The County is required by WAC 197-11-600(3)(b)(ii) to prepare a supplemental EIS to consider new information. This information was presented at a meeting on November 11, 2003. The new information demonstrates that the project has probable significant adverse impacts on the environment that are not accounted for in the FEIS.***

Under this argument, Friends of the East Fork assert that the substantive information their representatives conveyed to County staff in a November 11, 2003 meeting (Ex. 270) was substantive and significant, relative to information already addressed in the FEIS, and required the development of a supplemental EIS. Clark County staff members Mike Butts (Development Services Manager), David Howe (habitat biologist) and Josh Warner (planning staff) attended that meeting, and each of them heard and reviewed the new information. Mr. Howe has education and experience in as a habitat biologist (Ex. 361), which qualifies him as an expert. These County staff members reviewed the new information, determined it was not significantly different from the information that was already in the record, and did not require a supplemental EIS under WAC 197-11-600(3)(b)(ii).<sup>22</sup>

The services, in fact, determined that the information submitted during this period did not constitute new information that necessitated either an addendum or a supplemental EIS (Exs. 278, 279, 414, 415, 425, 439, 445 & 449). FEMA also reviewed the so-called new information regarding the channel migration zones (CMZ) and the threat of flooding and avulsion and found no basis for revising the existing Flood Insurance Rate Maps or the 100-year floodplain delineation (Exs. 483 & 580 pp 110-13). In fact, FEMA determined that most of the new mining proposed in these consolidated applications will be above the 500-year floodplain (Ex. 483). This determination is corroborated by the revised FEMA flood insurance rate map (FIRM) that redesignated the 100-year floodplain (Exs. 137 & 157) and the most severe flood event of recent time, which occurred in 1996 and was classified as a 500-year event (Ex. 657, tab N).

On this basis, the Examiner finds that the information provided by the Friends of East Fork at the November 11, 2003 meeting was not significantly different from what was already in the record and had been analyzed in the range of alternatives and impacts in the existing environmental documents. Moreover, this information and these issues were not new, nor were they overlooked by the applicant, reviewing agencies or the County. Finally, the Friends of East Fork do not allege that the information provided at the November 11, 2003 meeting had been misrepresented by the applicant. The new information did not and does not warrant a supplemental EIS or an addendum.

**Fourth Appeal Issue (rezone): *The FEIS is substantively inadequate to satisfy the County's SEPA policies. As a result, the FEIS cannot meet the County's environmental review standards, and under WAC 197-11-630, cannot be adopted by the County. Specifically, unlike NEPA, SEPA contains substantive as well as procedural protections for the environment. The FEIS fails to demonstrate that the proposed project will meet the substantive criteria of the following County SEPA policies, which the County has adopted to implement the substantive elements of SEPA:***

<sup>22</sup>

WAC 197-11-600(3)(b)(ii) requires a supplemental EIS only if:

"...there is new information indicating a proposal's probable significant adverse environmental impacts, including discovery of misrepresentation or lack of material disclosure. However, an SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents."

In this appeal issue, Friends of the East Fork assert that the FEIS was and is substantively deficient in several respects, does not satisfy the requirements of several of the County's adopted SEPA policies, and therefore cannot be adopted under WAC 197-11-630. Significant for the resolution of this argument, Friends of the East Fork does not assert that the adopted environmental documents fail to disclose significant impacts. The Examiner will address in turn each of the substantive SEPA policies implicated in this appeal issue.

**(a) CCC 20.50.025(2) - “The county recognizes that each person has a fundamental and inalienable right to a healthy environment, and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”**

The Friends of the East Fork do not elaborate or explain what, in its view, this policy requires, much less, how it might be violated by the environmental documents in the record. The Examiner finds that this policy is ambiguous and requires a certain amount of interpretation to apply. The Examiner finds that this policy is implemented through the County's compliance with SEPA, its land use planning and permitting program and by subjecting all land developments to these regulatory schemes. These regulations are designed to provide and protect a healthy environment, and every permit applicant subjected to SEPA and the County's land use permitting program necessarily contributes to the preservation and enhancement of the environment.

The applicant in this case is required to achieve the mandatory approval standards for the CPU, rezone, shoreline permit, wetland permit and site plan review and will provide a substantial amount of environmental restoration and enhancement by implementing the conservation and monitoring measures of the HCP. Compliance with these procedures and substantive requirements achieves the objectives of this policy. On this basis, and without a more specific allegation of how this policy is violated, the Examiner finds that the policy is met.

**(b) CCC 20.50.025(3)(a) - “Earth. It is the county's policy to avoid or minimize adverse impacts from ground-disturbing activities and land use changes within areas of steep or unstable slopes, areas with severe soil limitations, areas most susceptible to earthquake damage, and areas of erosion potential.”**

Friends of the East Fork assert, with no explanation or elaboration, that this development proposal fails to achieve this policy objective. By its terms, this policy applies to ground-disturbing activities that change the topography of the land. The policy does not prohibit those activities, but calls for the avoidance of steep, unstable slopes, areas with severe soil limitations, and susceptibility to earthquake damage and erosion.

There is no evidence in the record to suggest that the subject site has steep or unstable slopes, areas with severe soil limitations, areas susceptible to earthquake damage or erosion potential. In short, based on the record before the Examiner, this policy does not appear to apply to this site, and the Friends of the East Fork do not explain its relevance. There is no evidence of steep or unstable slopes, propensity for earthquake damage, erosion potential or severe soil limitations. To the extent this policy applies to this proposal, the Examiner finds that its requirements are met. It is significant that the policy does not impose any absolute requirements or prohibitions, *i.e.*, it uses

non-mandatory terms like “avoid” and “minimize.” On this basis, and without a more specific allegation of how this policy is violated, the Examiner finds that the proposal minimizes impacts to land with the identified characteristics.

**(c) CCC 20.50.025(3)(c) – “Water. It is the county’s policy to conserve and protect the quality, quantity and functional value of surface waters, wetlands, floodplains, and groundwaters by enforcing code provisions and through the imposition of other reasonable measures.”**

Friends of the East Fork assert, with no explanation or elaboration, that this development proposal fails to achieve this policy objective. The Examiner notes that the list of water resources is supposed to be conserved and protected by enforcing code provisions and imposing other reasonable measures. In this particular case, no mining is proposed for the floodplain or in the river – in contrast to the operator’s current nonconforming use right which could possibly include mining that will be harmful to ground and surface water quality (Ex. 40). Consequently, it is clear that the County’s SEPA program and land use permitting and development regulations are the mechanism by which this policy objective is achieved. In this light, the Examiner interprets this policy to not impose an independent approval criterion to development permits, but rather applies to the County’s development code provisions and is necessarily implemented through the development code. On this basis, and without a more specific allegation of how this policy is violated, the Examiner finds that the policy is met. That reality is demonstrated by the riparian rehabilitation and enhancement required as conditions of this development approval and the conservation and monitoring measures related to surface and ground water quality and required by the HCP. The Examiner finds that these are the “reasonable measures” referred to in the policy, and that the policy is met.

**(d) CCC 20.50.025(d) – Plants and Animals. It is the county’s policy “to preserve sensitive wildlife habitat areas and to conserve priority habitat areas...” In addition to implementing code provisions, “it is further the county’s policy to provide special protection for rare, threatened and endangered plant species, and for habitat of rare, threatened, or endangered species of fish and wildlife.”**

Friends of the East Fork asserts, with no explanation or elaboration, that this development proposal fails to achieve this policy objective. The Examiner notes that the policy’s focus is on identified sensitive wildlife habitat areas and listed plant and animal species. The threatened and endangered species implicated by this proposal are the fish that inhabit the EFLR and the riparian habitat that follows the River through this site, and which are the subject of the ITP approved by the services. The terms of this policy clearly state that identified habitat and listed species are to receive “special protection” and their habitat is to be conserved.

The Examiner finds that these policy objectives are the exclusive focus of the ITP, the HCP and the federal NEPA process. This process and the substantive outcome, *i.e.*, the FHCP, ITP and FEIS, provide the special protection for these listed species and their habitat required by the policy. In particular, the services concluded that the approval of the ITP:

“...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse

modification of habitat of such species which is determined by the [services] ... to be critical”

(Exs. 410, 414, 435 & 439)

On this basis, and without a more specific allegation or evidence of how this policy is violated, the Examiner finds that the policy is met, and the FEIS is adequate.

**Fifth Appeal Issue (rezone): *The FEIS does not consider or fails to give adequate consideration to the several probable significant adverse environmental impacts of the proposed project, including probable significant adverse environmental impacts that are associated with the project and cannot be mitigated.***

Friends of the East Fork assert in their final argument that the County’s decision to adopt the final federal NEPA documents as satisfaction of its SEPA obligations, failed to consider several probable significant adverse environmental impacts that could not be mitigated. In particular, the Friends of the East Fork point to eight specific issues or aspects of the project that they assert were not adequately considered.

***(a) The project will increase the threat to the numbers of and critical habitat for numerous threatened species, candidate threatened species and species of concern that inhabit the East Fork, including Steelhead, chum salmon, Chinook salmon, coho salmon, sea-run cutthroat trout, Pacific lamprey, and river lamprey. In particular, virtually all of the chum salmon habitat for spawning exists downstream from the Daybreak site, and the project threatens to undo habitat restoration efforts and discourage future restoration efforts. The State of Washington WDFW has previously stated that the loss of fish habitat resulting from the proposed project would be so extensive that it cannot be mitigated under any circumstances.***

Under this argument, Friends of the East Fork claim that the County’s SEPA decision, and by implication the federal NEPA documents, fail to adequately address the likely impacts of this project on the seven species of protected fish that breed in the EFLR on and near this site. This appears to be the primary thrust of the testimony from the Friends of the East Fork and the many fishing groups and individuals that testified at the hearings in this matter.

In short, the Examiner concludes that the environmental documents (Exs. 276, 277, 278 & 394) adopted by the County (Exs. 281 & 341) are adequate to disclose and describe the likely environmental effects of the proposed project on listed fish and their habitat. The evidence cited by the opponents and appellants in support of their contention that the FEIS is not adequate and that the project’s impacts cannot be mitigated appear to predate the completion of the FEIS and HCP. In fact, the Services have addressed all final assertions that the FEIS is not adequate in their final response to comments (Ex. 415) and in the ITP (Exs. 410, 414 & 415). The Examiner also concludes, based on the evidence in the record, that the project is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the habitat upon which listed fish species depend. This conclusion is confirmed by the Services’ no-jeopardy biological



opinion (Ex. 414) the approved HCP (Exs. 276 & 394) and the Washington DNR's concurrence that the HCP is adequate (Ex. 337).

This SEPA appeal argument also has an evidentiary component, viz., that virtually all of the chum salmon spawning habitat is downstream from the Daybreak site. The record, in fact, contains credible expert evidence and testimony that chum salmon habitat exists elsewhere, i.e., above the mine site, and that this proposal does not necessarily present an increased threat to this or the other listed fish species in the EFLR. See, e.g., Exs. 439, 657 tab G, 267 pp 3-75 to 3-88 and tech app A, and the June 1, 2004 testimony of Dudley Reiser. The fact that the proposed mine (as opposed to the historic mining operation) will be more than 1,800 feet from the EFLR, outside of the CMZ, outside of the 100-year floodplain, and mostly outside of the 500-year floodplain. Finally the beneficial effects of riparian and wetland habitat restoration (52 acres of forested wetland, 32 acres of emergent wetland and 102 acres of open water), \$250,000 of in-kind habitat restoration services, a \$1 million habitat restoration endowment, and the ultimate protection of the entire property from development will, over the long-run, substantially benefit the listed fish and their habitat. The alternative mining and development scenario (see previous nonconforming use discussion) will have a significantly detrimental effect on these species. The Examiner regards these facts as substantial evidence of the limited impact the proposed mining operation will have on protected fish species.

The Examiner regards this and the other cited evidence as credible, expert and persuasive and accepts it in support of the conclusion that this project is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of fish habitat. More to the point, with regard to the SEPA appeal, these issues and impacts were thoroughly examined in the environmental documents and EIS adopted by the County in this matter.

***(b) The Daybreak Mine is a significant contributor to high water temperatures in the East Fork and Dean Creek. The proposed project will exacerbate rather than mitigate existing problems with elevated water temperatures in both water bodies. The FEIS fails to give adequate consideration to impact of the proposed project on water temperatures.***

In this argument, Friends of the East Fork assert that warm water discharged from the existing settling ponds to the EFLR via Dean Creek has caused, and will continue to cause, elevated water temperatures in the EFLR.

This issue was raised below during the NEPA comment period and was thoroughly discussed and analyzed in the EIS and related environmental documents. See Ex. 276 pp 3-39 to 3-42 and 6-25 to 6-27. The issue of high water temperature effects was also addressed in the response to comments prior to finalization of the EIS (Ex. 278, pp 23-40). The HCP provides several conservation measures specifically designed to lower water temperatures, particular water flowing from pond 5 into Dean Creek (CM-03 & CM-04) and to increase riparian vegetation, which will have the effect of maintaining lower water temperatures (CM-13). The Services concluded that with these measures, the project would not adversely affect the flow or water temperature entering the EFLR (Ex. 415, app C pp 9-10). In light of this evidence, discussion, and the

resulting measures, the Examiner concludes that the EIS adequately addresses this issue.

- (c) *The Daybreak Mine has been a significant source of fine sediment to the East Fork and Dean Creek. The proposed project will exacerbate rather than mitigate turbidity and the smothering of salmonids with fine silt. The FEIS fails to give adequate consideration to the effects of proposed project on fine sediment loading, from chronic and occasional catastrophic releases.***

Friends of the East Fork assert that the wash water, which contains high concentrations of fine sediments, has been and will continue to be discharged through the pond system into the EFLR. The result will be increased turbidity, the deterioration of surface water quality and the silting-up of spawning gravels, to the collective detriment of listed fish species.

This issue was raised during the scoping process, and was thoroughly discussed in the EIS (Ex. 277) and related documents, the HCP (Ex. 276) and in the response to comments (Ex. 278). The HCP, in particular, discusses and analyzes the base conditions regarding fine sediments coming out of the 5-pond system into Dean Creek and into the EFLR (Ex. 276, pp 3-38, 3-44 to 3-51). The FEIS (Ex. 277, §3.4.1.2) also describes the baseline situation. Gravel is washed and the sediment laden wash water gradually flows through the series of 5 ponds while fine sediments settle out of the water column. The clarified effluent eventually is discharged out of the system into Dean Creek. The operator uses flocculent chemicals that bind with the fine sediments and facilitate their settling out in the ponds so that the discharge into Dean Creek is relatively clear. This discharge is subject to the operational limitations of an NPDES permit administered and enforced by DOE.

The project HCP (Ex. 276) proposes several conservation measures to reduce fine sediments and ensure that the NPDES limitations are met. In particular, pursuant to CM-01 the operator will use a closed-loop clarifier system by the third year, and a water management plan under CM-04 will reduce the likelihood of sediment resuspension and the discharge turbidity. These mitigation measures are also discussed in the FEIS (Ex. 277, §3.4.4.3). In light of this evidence, discussion, and the resulting measures, the Examiner concludes that the EIS adequately addresses this issue.

- (d) *There is substantial long-term risk of the East Fork migrating toward the proposed and existing man-made ponds, jumping its channel and “avulsing” into the ponds. Such a catastrophic event would severely impact water quality and stream geomorphology, resulting in severe impacts on fish species, including threatened species. The proposed project purports to resist avulsion and minimize its effects when it occurs. However, avulsion is an inevitable event, and the project will increase the detrimental impacts of avulsion when it does occur. This is a significant adverse impact that cannot be mitigated by the proposed project, and which is not adequately evaluated in the FEIS.***

As described by the Friends of the East Fork, this issue is related to the previous two and stands to affect water quality. The five existing ponds are immediately adjacent to the EFLR and within the 100-year floodplain. The ponds contain substantial quantities

of fine sediments and bound flocculant chemicals accumulated over years of gravel washing process. During a major flood event, there is a chance that the EFLR will avulse from its current channel into the ponds, as occurred with the Ridgefield ponds during the 1996 flood event. When the EFLR avulses into the pond system, it will flush-out the contents of the ponds and resuspend the accumulated sediments and flocculant chemicals. The likelihood of such an avulsing event appears to be relatively certain over the long-term, and the question is how soon might such a flood event and avulsion occur and what would be the nature and effect of the sediment load released from the site.

This issue was the subject of a substantial amount of testimony at the three hearings and an extensive amount of written material submitted by both sides of the proposal. The HCP addresses the issue extensively (Ex. 276, Addendum 1 and Tech App C). The FEIS also provides a detailed analysis and discussion of mitigation of the potential environmental impacts in the unlikely event that pit capture does occur (Ex. 277, §3.6 pp 121-130). The Services also addresses these risk of avulsion in their response to comments on the FEIS (Ex. 415) and in the BO (Ex. 439, pp 69-73). Proposed mitigation measures include specific pond configurations that route flow a certain way, mimic pool or off-channel habitats, recreate hydrologically connected wetlands, and reduce geomorphic recovery time; reforestation and reclaiming areas adjacent to the new river channel to provide bank erosion protection and fish and wildlife habitat; and through the placement of large-woody debris in pond and/or flow areas for fish habitat and structural diversity (Ex. 277, §2.3.4, pp. 36-37). According to the Services, these measures will significantly reduce the potential impacts to listed fish species, provided the approved HCP (Ex. 276) is fully implemented.

The FEIS documents that channel migration and shifting will occur in the project area on a geologic time-scale, but the likelihood of such an event happening during active mining or reclamation is small (Ex. 277, §3.6.1.3, p 122). The greatest threat of avulsion is through the existing mining ponds and not through the proposed upland mining area. According to the FEIS, the presence of road infrastructure, distance between the current channel and proposed pits, and the existing Daybreak pits, are all significant obstacles to the EFLR avulsing into the proposed expansion area.

In light of this evidence, the detailed discussion, and the resulting conservation measures, the Examiner concludes that the FEIS adequately addresses this issue. While differing opinions exist about the validity of the applicant's conclusions, the FEIS and related environmental documents provide a thorough description and discussion of the issue, and for that reason, the Examiner finds that it is adequate.

***(e) The risk of avulsion is greater than recognized by the FEIS, as new information demonstrates that the proposed mine expansion area is within the channel migration zone of the East Fork.***

In this appeal issue, Friends of the East Fork assert that the FEIS is defective because it underestimates the chance of the EFLR avulsing from its current channel and overtaking the Daybreak site ponds. The basis of this claim is, what Friends of the East Fork claims to be, "new information" that the existing ponds are within the River's CMZ.

The HCP, which is incorporated by reference into the FEIS, includes a detailed discussion of the CMZ and hydrologic habits (Ex. 276, tech app C). The CMZ is based on existing and foreseeable conditions and also, in part, on applicable federal and state

statutes, rules and regulations. The CMZ is also based on the common law doctrine that private and public landowners will take action to protect residences, County-owned facilities, such as the public works facility, County arterial roadways and related infrastructure, such as the Daybreak Bridge. The HCP recognizes the potential for channel migration and avulsion into the existing ponds, and the FEIS identifies and discusses these issues.

The applicant's hydrogeology expert provided additional testimony about river geomorphology, the location and width of the channel migration zone and the risk of avulsion (Ex. 483). These documents show that the channel migration zone includes the current Daybreak ponds, and clearly states that the EFLR channel will some day avulse into and through these ponds. The recognition of this potential for channel migration into the existing ponds resulted in the development of several of the monitoring and conservation measures specifically addressing avulsion, e.g., CM-05, CM-06, CM-07, CM-08, CM-09 & CM-10. However, it is also clear from the record that the proposed mining area – some 1,800 feet from the River – is outside of the 100-year floodplain due to FEMA's revision of the floodplain following the 1996 flood (Exs. 137 & 157). Finally, the applicant provided a summary response to this issue in its final rebuttal in this case with citations to the NEPA documentation where the issue was addressed (Ex. 691, pp 17-20).

The Examiner finds that the issue of CZM and avulsion was thoroughly and adequately discussed in the FEIS and related environmental documents. The assertion that the proposed mine ponds – outside of the 100-year floodplain and mostly outside of the 500-year floodplain – does not constitute new information that necessitates a supplemental or amended EIS. There is substantial evidence in the record sufficient to indicate that this possibility is remote and does not invalidate or detract from the assessment of the subject in the FEIS.

***(f) The FEIS fails to give adequate consideration to the impacts on groundwater and surface water quality of the use of flocculant chemicals in the proposed operation.***

Friends of the East Fork assert that the FEIS is inadequate because it does not give adequate consideration to the potential impacts of the flocculant chemicals used in the washing process on surface and groundwater quality. These chemicals promote the aggregations of fine suspended sediments into larger particles, thereby facilitating their settling out of the water column. The issue of using flocculants in the processing operations and their potential impact on water quality is addressed extensively in the FEIS (Ex. 277, ch. 3, p 69), HCP (Ex. 276, pp 3-64), the Response to Comments (Ex. 278, p 76) and the BO (Ex. 439, pp 59-62). These documents describe the additives proposed to be used for water quality purposes and conclude that their potential impact on the environment is minimal. On this basis, the Examiner concludes that the FEIS, which incorporates the HCP, adequately addresses this issue.

***(g) The FEIS fails to give adequate consideration to the direct and indirect cumulative effects of gravel mining on the East Fork and surrounding drainages.***

Friends of the East Fork assert that the FEIS did not give adequate consideration to the direct and indirect cumulative effects of gravel mining on the East Fork and

surrounding drainages. In fact, this issue is addressed in both the FEIS (Ex. 277) and the response to comments (Ex. 278). In particular, §3.8 of the FEIS (Ex. 277, chapter 3, p 192) discusses cumulative impacts of the proposed development and Table 3-4 (Ex. 277, chapter 3, p. 198) summarizes the findings. This and related concerns were also addressed in the RTC in General Comment 17 (Ex. 278, p 81) and Table 3-22 (Ex. 278, p 87). In the FEIS the Services state they have “considered the cumulative effects of each of the conservation measures with respect to each of the environmental elements analyzed, but focused on the existing, baseline conditions and the long-term cumulative effects of the project on the East Fork Lewis River and the species proposed for coverage. The Services believe the benefits with respect to long-term cumulative effects of implementing the preferred alternative are significant compared to the other alternatives.” (Ex. 277, chapter 3, p 206). On this basis, the Examiner concludes that the FEIS and related environmental documents adequately address this issue.

***(h) The FEIS does not consider a full range of alternatives to the proposed project, including its failure to include a true no-mining alternative. It also misstates the potential environmental impacts of alternative land uses, such as subdivision into 20 acre parcels.***

The “no action” alternative in the FEIS (Ex. 277, pp 2, §§2.1 & 2.2) assumed that the current level of mining and processing would continue in the EFLR floodplain and when the mineral resource at that location is exhausted, the land would be subdivided into 20-acre homesites, sold and subsequently developed. In this substantive SEPA issue, Friends of the East Fork assert that the “no action” alternative considered as one of the options in the FEIS should have been a no mining and no subsequent development alternative.

The federal nexus that implicates and requires compliance with NEPA is the Services’ action on the ITP and the USACE’s action on the wetland fill permit. Absent both of these federal actions, there would be no federal nexus and no requirement to comply with NEPA. The “no action” alternative required by NEPA is supposed to be a no governmental action alternative, not necessarily a no development action. As discussed in detail above, the Examiner concludes that the operator of the Daybreak site has a vested nonconforming right to a certain historic level of mining and processing based upon a 1996 written nonconforming use determination made by the County (Ex. 40). The operator may engage in this level of mining and processing without any federal agency action and without complying with NEPA. Since the County issued its nonconforming use determination, the Washington Supreme Court in expressly adopted the diminishing assets doctrine. *University Place v. McGuire*, 144 Wn.2d 640, 30 P.3d 453 (2001) and the Court of Appeals has held that, while the county may reasonably regulate mining activity, it may not prohibit its expansion. *Rhod-a-zalea & 35<sup>th</sup> Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998).

It is therefore appropriate and lawful for the FEIS to assume a “no action” alternative that reflects the legal reality of the nonconforming use determination and the level of development allowed outright on the property. The FEIS and related environmental documents correctly describe, discuss and evaluate the “no action” alternative.

**Sixth Appeal Issue (CUP): *The County has not taken the steps necessary to properly adopt the FEIS as a SEPA document. WAC 197-11-630(1) requires***

***that an agency adopting an existing environmental document “must independently review the content of the document and determine that it meets the adopting agency’s environmental review standards and needs for the proposal.***

***(a) The draft federal ETS, and did not perform an independent review of the content of the FEIS. As the County did not perform an independent review of the document it proposes to adopt, before noticing its proposed adoption, the County has not satisfied the requirements of WAC 197-11-630(1).***

The Examiner incorporates by reference his response to the Friends of the East Fork’s second appeal issue (rezone) set forth above.

***(b) The County Department of Community Development did not perform an independent review of whether either the draft or the final federal EIS meets the substantive criteria of the County’s environmental review standards. As a result, the County has not satisfied the substantive criteria for adoption of an existing document set forth in WAC 197-11-630.***

The Examiner incorporates by reference his response to the Friends of the East Fork’s first and second appeal issues (rezone) set forth above.

**Seventh Appeal Issue (CUP): *The FEIS does not properly consider the activity proposed in the conditional use permit, which is a gravel crushing operation. ... The FEIS fundamentally fails to give adequate consideration to the probable significant adverse environmental impacts of the proposed project, including probable significant adverse environmental impacts that are associated with the project and cannot be mitigated. These include noise; creation of fine particulate matter that affects surface water quality, performance of settling ponds, and groundwater quality; placement of large quantities of rock and fines in the coastal management zone/shoreline management area; dust; additional truck traffic; and potential impacts on the river and surrounding properties in the event of flood and/or avulsion.***

The gist of this SEPA appeal issue is that the FEIS fails to assume no processing or extracting activity as the base level or “no action” alternative. This argument ignores the legal and factual reality of the applicant and owner’s lawful nonconforming use right to process material at this site. In response, the Examiner incorporates herein by this reference his prior nonconforming use discussion. Friends of the East Fork also appear to assert that dust, traffic, noise and noise impacts were not adequately addressed in the FEIS. The record does not support this contention because the FEIS includes an extensive discussion and technical appendix on noise (Ex. 277, App B) and a memorandum on ambient noise (Ex. 377).

The FEIS also includes an extensive discussion and technical appendix on traffic (Ex. 277, App A). Dust and other particulate matter emissions are regulated in Clark County by the Southwest Clean Air Agency (SWCAA), and there are existing air quality permits for the processing equipment that the applicant proposes to use at the Daybreak

site (Ex. 332). Dust is also addressed in the FEIS (Ex. 277, p 40). Because most of the rock extraction will be below the water table and the material will be saturated with water, significant dust emissions are not expected. The FEIS anticipates that approval of the CUP for crushing will not result in a significant increase in truck traffic. Truck traffic appears to be a result of extraction. In any event, all of these issues are thoroughly discussed in the FEIS, and while different parties may disagree with the final resolution of these issues, the FEIS is adequate.

**Eighth Appeal Issue (CUP):** *The Because the FEIS does not adequately discuss gravel crushing operations or impacts from such operations, the FEIS fails to provide the Hearing Examiner with the information necessary to evaluate whether the use applied for will “be significantly detrimental to the health, safety, or general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the county,” and so does not provide the Hearing Examiner with the information necessary to make a determination under CCC 40.520.030.E.2.*

As described in the preceding section, the FEIS adequately addresses and describes the potential noise, dust and traffic impacts of the rock crushing aspect of the proposed mining operation. In this issue, Friends of the East Fork assert that the FEIS is so deficient in these substantive areas as to not provide enough information upon which to formulate an opinion about the significance of these potential impacts. Again, the Examiner disagrees. Not only is the FEIS, and related environmental documents incorporated by reference, adequate in terms of their discussion of these impact issues, but additional information has been submitted that addresses these issues even more fully. The Examiner disagrees with Friends of the East Fork and finds that collectively the FEIS, related environmental documents and the other testimony and evidence in the record provide a factually complete picture of these impact issues upon which the Examiner can determine significance.

**Ninth Appeal Issue (CUP):** *The County is required by CCC 40.570.070 and WAC 197-11-600(3)(b)(ii) to prepare a supplemental EIS to consider new information relating water temperature, stream flow, cumulative effects of mining operations on the channel migration zone, and the position of the proposed mine expansion within the historic channel migration zone presented at a meeting on November 11, 2003.*

The Examiner incorporates by reference his response to the Friends of the East Fork's third appeal issue (rezone) set forth above.

**Tenth Appeal Issue (CUP):** *The FEIS is substantively inadequate to satisfy the County's SEPA policies. As a result, the FEIS cannot meet the County's environmental review standards, and under CCC 40.570.070 and WAC 197-11-630, cannot be adopted by the County. Specifically, unlike NEPA, SEPA contains substantive as well as procedural protections for the environment. The FEIS fails to demonstrate that the proposed project will meet the substantive criteria of the following County SEPA policies, which the County has adopted to implement the substantive elements of SEPA:*

- (a) **CCC 40.570.080.C.2 - “The county recognizes that each person has a fundamental an inalienable right to a healthy environment, and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”**

The Examiner incorporates by reference his response to the Friends of the East Fork’s appeal issue 4(a) (rezone) set forth above.

- (b) **CCC 40.570.080.C.3.a - “Earth. It is the county’s policy to avoid or minimize adverse impacts from ground-disturbing activities and land use changes within areas of steep or unstable slopes, areas with severe soil limitations, areas most susceptible to earthquake damage, and areas of erosion potential.”**

The Examiner incorporates by reference his response to the Friends of the East Fork’s appeal issue 4(a) (rezone) set forth above.

- (c) **CCC 40.570.080.C.3.b - Air: “In addition to compliance with the standards and requirements of... code provisions, it is also the county’s policy to further mitigate the generation of dust and odors from land use activities through the local permitting process.”**

The Examiner incorporates by reference his response to the Friends of the East Fork’s seventh appeal issue (CUP) set forth above, and on that basis concludes that the FEIS and related environmental documents adequately address this issue. Issues related to dust are addressed in the FEIS (Ex. 277, p 40). Most of the resource extraction is proposed to be below the water table, where the material will be saturated and dust will not be a problem. Additionally, dust emissions are regulated in Clark County by SWCAA, and the operator of the Daybreak site has obtained air quality permits for the processing equipment at the site (see application materials at Ex. 332). The proposed processing is covered by the SWCAA permits.

- (d) **CCC 40.570.080.C.3.c - Water. “It is the county’s policy to conserve and protect the quality, quantity and functional value of surface waters, wetlands, floodplains, and groundwaters” by enforcing code provisions “and through the imposition of other reasonable measures**

The Examiner incorporates by reference his response to the Friends of the East Fork’s appeal issue 4(c) (rezone) set forth above.

- (e) **CCC 40.570.080.C.3.d - Plants and Animals. It is the county’s policy “to preserve sensitive wildlife habitat areas and to conserve priority habitat areas . . .” In addition to implementing code provisions, “it is further the county’s policy to provide special protection for rare, threatened and endangered plant species, and for habitat of rare, threatened, or endangered species of fish and wildlife.”**

The Examiner incorporates by reference his response to the Friends of the East Fork’s appeal issue 4(d) (rezone) set forth above.



**Eleventh Appeal Issue (CUP):** *CCC 40.570.080.C.3.g - Noise. "It is the county's policy to minimize noise impacts associated with land use changes, including those related to existing sources of noise an increase of more than five (5) decibels (dBA) over ambient noise levels at the receiving properties may be considered significant."*

Noise is addressed in the FEIS (Ex. 277) in §3.7.3.4 (pp 168-173) and Technical Appendix B. The county's standard for addressing noise under SEPA is reviewed in the FEIS in §3.7.3.5 (pp 174-76) and in an addendum from the applicant (Ex. 377). On this basis, the Examiner finds that noise, including this policy in CCC 40.570.080.C.3.g, is adequately addressed in the FEIS and related environmental documentation.

**Twelfth Appeal Issue (CUP):** *The FEIS fails to give adequate consideration to the direct and indirect cumulative effects of gravel crushing in combination with gravel mining on the East Fork and surrounding drainages.*

The Examiner incorporates by reference his response to the Friends of the East Fork's appeal issue 5(g) (rezone) set forth above.

**Thirteenth Appeal Issue (CUP):** *The FEIS does not consider a full range of alternatives to the proposed project, including its failure to include a true no-mining alternative. It also misstates the potential environmental impacts of alternative land uses, such as subdivision into 20-acre parcels.*

The Examiner incorporates by reference his response to the Friends of the East Fork's appeal issue 5(h) (rezone) set forth above.

**B. Scott Rose appeals (Exs. 288 & 345):**

**First Appeal Issue (rezone):** *The public comment period for this Final Environmental Impact Statement (FEIS) and Final Habitat Enhancement Plan (FHCP) has not, as of yet, come to a close (Deadline for additional comments are not due until January 28, 2004) and, it has not yet been determined whether a supplemental EIS or addendum will be or should be prepared. Following the comment period, the Services will review and respond to new information in the final decision documents. Therefore, the record of decision is still pending and it is likely that new information is probable and therefore an independent review of all concerns could not have occurred.*

This is the same as the first appeal issue raised by Friends of the East Fork. The Examiner incorporates herein by reference his response and resolution of that argument set forth above.

**Second Appeal Issue (rezone):** *The Services documents fail to adequately address issues that the USFWS and NOAA Fisheries are not required to address under NEPA.*

In this argument, Mr. Rose asserts that the FEIS omits discussion of issues that are not required to be addressed under federal NEPA law, but are required to be addressed under SEPA. Mr. Rose does not specify the issues he is referring to, but

noise and transportation impacts are the only substantive topics required to be addressed under SEPA that are not also included under NEPA. On the assumption this is the essence of Mr. Rose's second appeal issue, the Examiner disagrees. Transportation impacts are addressed in §3.7.2.11 of the FEIS (Ex. 277, pp 162-63) and Technical Appendix A. Noise is addressed in §§3.7.3.4 & 3.7.3.5 (Ex. 277, pp 168-176) and Technical Appendix B. The FEIS concludes, based on these sections, that neither traffic nor noise are likely to present potential significant adverse environmental impacts. In any event, the Examiner concludes that the FEIS and related environmental documentation adequately address both topics.

**Third Appeal Issue (rezone): *Much of what is given as background conditions at this site, noise, traffic, air quality, etcetera, including studies and reports used as reference in the services documents occurred when the applicant was illegally operating without a shoreline permit. In fact, the County issued a stop work order in February of 2001, informing the applicant that this operation was not in compliance. Therefore, all studies, reports, and conclusions performed before this stop work order do not reflect legal existing conditions and cannot be considered as existing or background conditions.***

In this argument, Mr. Rose challenges the base level or background level of processing on the site and asserts that part of that assumed base level was illegal. As a starting point, the Examiner incorporates herein by this reference his findings and conclusions with regard to nonconforming use rights, especially those documented by the County (Ex. 40). With regard to allegations of illegal processing not otherwise covered by the 1996 nonconforming use determination, again, the Examiner disagrees. On February 22, 2001 the county issued a stop work order (Ex. 212), which recognized the applicant's nonconforming right to process material within the historic processing footprint, but concluded that "wet processing" entailed improvements necessitating a shoreline permit. Since that time, the operator has since limited its rock processing to "dry" processing only. Staff reports no subsequent violations or violations of the stop work order. Therefore, the background or base level of processing is accurately reflected in the County's nonconforming use determination (Ex. 40) and the Examiner finds no basis for Mr. Rose's assertion that this level of operation is unlawful.

**Fourth Appeal Issue (rezone): *Water rights needed to fulfill the objectives of this proposal are not certain. In fact, without proven established water rights, goals outlined in the proposal are not attainable. A transfer of water rights is currently under appeal with the Department of Ecology and relinquishment of these rights is an issue.***

Water rights that are needed to fulfill CM-03 and related conditions of the HCP have been applied for with the DOE. There are currently water rights appurtenant to the property; however, those rights are for irrigation. If the change of use of the water rights cannot be obtained, the applicant will be unable to proceed unless other arrangements are proposed and approved by appropriate agencies, including Clark County. The applicant can use groundwater from existing wells provided the use does not exceed 5,000 gallons per day (RCW 90.44.050). The applicant is aware of the risks of proceeding with other permitting processes without the approved water rights from DOE. The issue was raised in comments to the DEIS and the Response to Comments (Ex. 278, p 97) states that: "If Ecology does not authorize change in use or transfer of the

water right, then the Services would confer with the applicant to determine additional conservation measures that may be utilized.” From this, the Examiner concludes that the FEIS, and related environmental documentation, adequately address the issue.

**Fifth Appeal Issue (CUP):** *As stated before, the above referenced environmental review process has not concluded. It has not been determined whether a supplemental EIS or addendum will be or should be prepared. Further, a record of decision is still pending. It is therefore, unlikely, that an independent review of the facts involved in this case could have occurred. It is my understanding that further information, dealing with this matter, have been submitted to the USFWS and NOAA Fisheries and that at least one additional site visit has occurred by Federal officials. This being considered, it seems likely that the County could not have had an opportunity to independently review all existing information which should be utilized for the purposes of making decisions that reflect the ‘Public Good’.*

The Examiner incorporates by reference his response to the Friends of the East Fork’s first appeal issue (rezone) set forth above.

**Sixth Appeal Issue (CUP):** *The document fails to adequately address the negative impacts associated with the discharge of process waste to the ground water. This discharge is likely to adversely impact the critical aquifer recharge area.*

The issue of impacts to groundwater from process waste water was discussed in the water quality section of the FEIS (Ex. 277, §3.5) and related environmental documentation. The County’s Development Engineering section reviewed the application, FEIS and HCP and reached the following conclusion:

Based on a review of the Final Environmental Impact Statement and the Final Daybreak Mine Expansion and Habitat Enhancement Project Habitat Conservation Plan (HCP), dated November, 2003, and prepared and supplied by the applicant, staff believes that the past mining operations have not resulted in adverse impacts on groundwater. Chapter 3 of the HCP discusses the existing conditions of the Daybreak Mine site and the East Fork Lewis River basin. This chapter includes information on the hydrology of the East Fork Lewis River, Dean Creek, the existing Daybreak ponds, and the local groundwater system. The plan also includes a discussion of connections between surface water and groundwater within the project site. The applicant has performed numerous analyses, collected data over many years, and monitored groundwater elevations at various locations (i.e. drinking and irrigation wells). Based on staff’s review of this information, we believe that this mining operation has not resulted in any interruption of the hydrological system at the local scale.

The applicant has provided data of groundwater elevation monitoring at various locations, including seven drinking wells and one irrigation well. In addition, three piezometers around the site have been monitored. The locations of these wells and piezometers are shown on Figure 3-11 of the

HCP. This material indicates that the existing Daybreak ponds do not drain the aquifer or alter the direction of groundwater flow.

The Examiner concludes that the treatment of the subject in the FEIS and related environmental documentation is adequate, as was the County's independent review of the subject.

**Seventh Appeal Issue (CUP):** *The document fails to adequately address the impacts of noise.*

The Examiner incorporates by reference his responses to the Friends of the East Fork's seventh and eleventh appeal issues (CUP) and his response to Scott Rose's second appeal issue (rezone) set forth above.

**Eighth Appeal Issue (CUP):** *The document fails to adequately address the impacts of increased traffic and the impacts to area roads. Though I have found that Storedahl truck drivers, are for the most part, professional courteous drivers, it cannot be said that all trucks utilizing the facility refrain from the use of 'Jake' brakes and drive vehicles that do not impact the environment.*

While Mr. Rose's eighth appeal issue appears to focus primarily on traffic, it also implicates traffic-related noise. These issues have already been raised, and the Examiner incorporates by reference his responses to the Friends of the East Fork's seventh and eleventh appeal issues (CUP), with regard to noise and Friends of the East Fork's seventh (CUP) and Scott Rose's second appeal issue (rezone) with regard to traffic. Additionally, County concurrency staff independently reviewed the applicant's traffic study, which is part of the FEIS (Ex. 277, App A), and found no concurrency or safety concerns with the proposed project (Ex. 313). The Examiner concludes that the FEIS and related environmental documents adequately address these issues.

**Ninth Appeal Issue (CUP):** *The document fails to adequately address the impacts to area residents and non-threatened wildlife from activities that occur during normal hours of activity and after normal hours of operation.*

Mr. Rose's ninth issue is vague and difficult to respond to. The Examiner generally disagrees with Mr. Rose's assertion because the FEIS and related environmental documentation addresses a wide range of impacts to area residents and non-threatened wildlife. In fact, chapter 3 of the FEIS, the supporting and incorporated documentation, collectively and comprehensively address the affected environment and environmental consequences. The Examiner finds that this treatment of the broad range of impacts to area residents and non-threatened wildlife in the FEIS is adequate.

**Tenth Appeal Issue (CUP):** *The document fails to adequately address the reduction or ways to control aesthetic impacts.*

Visual aesthetic impacts of the proposal are addressed in §§3.7.3.7-9 of the FEIS (Ex. 277, pp 177-83). Other aesthetic considerations (sound, smell, etc.) are addressed in the FEIS and related environmental documents under the headings of noise, dust, air quality. The Examiner finds that the FEIS' treatment of these topics is thorough and adequate.

**Eleventh Appeal Issue (CUP): The document fails to adequately address the impacts that flocculants or settling agents have on the environment.**

The Examiner incorporates by reference his response to the Friends of the East Fork's appeal issue 5(f) set forth above.

**Twelfth Appeal Issue (CUP): The document fails to adequately address that the process area is an artificially elevated area that consists of unconsolidated material that lies adjacent to areas that periodically flood and that this flood water can transports this unconsolidated material away from the site.**

In this appeal issue, Mr. Rose appears to implicate the risk of avulsion of the EFLR over the dike protecting the ponds and process area, as well as the potential impacts to water quality that avulsion might have. These issues have already been addressed, and the Examiner incorporates by reference his findings in response to Friends of the East Fork's appeal issues 3 and 5(d) and (e) regarding avulsion, and his findings in response to Friends of the East Fork's appeal issue 5(f) with regard to water quality issues. The FEIS and related documentation adequately address these issues.

In conclusion, the environmental documentation adequately describes the environmental impacts likely to result from this project. The environmental documentation clearly shows likely significant adverse environmental impacts will result if no mitigating measures are imposed. The record also shows, and the Examiner so concludes, that reasonable measures are available that will be sufficient to mitigate those impacts. On this basis and the foregoing findings, the Examiner denies the SEPA appeals of Friends of the East Fork and Scott Rose.

**VI. Decision and Conditions:**

Based on the foregoing findings and except as conditioned below, these consolidated applications are approved in general conformance with the applicant's proposal, preliminary site plan (Ex. 279), the approved HCP (Exs. 276 & 394), ITP (Exs. 410 & 414) and FEIS (Ex. 276). This approval is granted subject to the requirements that the applicant, owner or operator (the "owner/operator") shall comply with all applicable County Code provisions, laws and standards and the following conditions. These conditions shall be interpreted and implemented consistently with the foregoing findings.

**A. Conditions that shall be fulfilled prior to Final Site Plan approval:**

- A-1 The owner/operator shall submit to the County a reclamation plan approved by the Washington Department of Natural Resources for the proposed site. See Land Use Findings 9, 25 & 27.
- A-2 A plan to minimize the tracking of mud and dust onto public roadways shall be included in the erosion control plan. See Land Use Finding 35.
- A-3 The owner/operator of this mining operation shall conduct all operations in accordance with the *Final Environmental Impact Statement for Proposed Issuing of a Multiple Species Incidental Take Permit for the Daybreak Mine Expansion and Habitat Enhancement Project proposed by J.L. Storedahl and Sons, Inc.*,

(Ex. 277) and the *Final Daybreak Mining Expansion and Habitat Enhancement Project Habitat Conservation Plan* (Ex. 276) and any addenda and amendments thereto (Ex. 394). In particular, the owner/operator shall implement and fulfill the 18 conservation measures and 9 monitoring and evaluation measures described in the HCP, with one modification to CM-01: All product washing at the site shall be closed-loop or dry processing only and process wash water shall not be discharged into the existing pond system. The owner/applicant shall accelerate the development of a closed-loop dry process system and implement that system before any washing can occur on the site. See CUP Finding 39 and Shoreline Findings 57, 67 & 68.

- A-4 Operations on this site shall be subject to all applicable Clark County Road Standards in CCC chapter 12.05 that were in place at the time of vesting. See Transportation Finding 1.
- A-5 The owner/operator shall obtain approval of a Road Approach Permit for any new access points required for mining operations east of NE Bennett Road and NE 61<sup>st</sup> Avenue. See Transportation Finding 4.
- A-6 The owner/operator shall coordinate with, and obtain approval from, Clark County Public Works for any conveyor belt crossing the county right-of-way. See Transportation Finding 4.
- A-7 A groundwater monitoring program shall be required as reviewed and approved by Clark County. See Stormwater, Groundwater, Surface Water and Erosion Control Finding 2.
- A-8 Copies of all reports and documentation required under the terms of the HCP in connection with monitoring and evaluation measures shall be provided to the County at the same time they are submitted to the Services.
- A-9 Changes in connection with the adaptive management program contemplated in the monitoring and evaluation measures are considered to be part of the program approval and shall not require additional County approval so long as the following conditions exist:
  - a) County staff have participated fully in connection with any recommended adaptive management change; and
  - b) County staff have determined that any such changes are not material changes under either shoreline or County development regulations, do not conflict with provisions of the permits approved in this consolidated application, and do not otherwise require a formal permit or modification under state law or the County Code.
- A-10 The proposed Daybreak Mine Expansion is subject to, and shall comply with, Clark County's Stormwater and Erosion Control Ordinance (CCC chapter 13.25) during mining and reclamation. See Stormwater, Groundwater, Surface Water and Erosion Control Finding 1.
- A-11 Prior to disturbance taking place on the approximately 2-acre area north of Pond 3 and adjacent to Dean Creek, the owner/operator shall have an archaeological survey completed by a suitably qualified professional and the results of that

survey shall be submitted to Clark County and the Office of Archaeology and Historic Preservation for review and approval. In the event that archaeological material is encountered at any time during the course of mining activity on the site, the owner/operator shall immediately notify a suitably qualified professional archaeologist and halt work in the vicinity of the find until they can be inspected, assessed and appropriate action taken. See Archaeology Finding 2.

- A-12 All work done at this site under these consolidated county land use approvals shall comply with all applicable requirements of the Fire Code and any conditions recommended by the Fire Marshal's Office. See Fire Protection Finding 1.

**B. The following notes shall be placed on the final site plan:**

- B-1 "The owner/operator of this mining operation shall conduct all operations in accordance with the *Final Environmental Impact Statement for Proposed Issuing of a Multiple Species Incidental Take Permit for the Daybreak Mine Expansion and Habitat Enhancement Project proposed by J.L. Storedahl and Sons, Inc.*, (Ex. 277, dated November 2003) and the *Final Daybreak Mining Expansion and Habitat Enhancement Project Habitat Conservation Plan* (Ex. 276, dated November 2003) and any addenda and amendments thereto (Ex. 394)."
- B-2 "All excavation and processing at this site shall comply with the noise limitations in WAC 173-60. All mining equipment operated at the site shall use 'smart alarm' back-up beepers which detect background sound levels and automatically adjust the output level to keep the level within five to 10 dB of the background level." See Land Use Finding 30.
- B-3 "Noise monitoring shall take place at the beginning of each mining phase and submitted for review to the county. Conditions pertaining to noise may be modified, augmented or eliminated depending upon how effective they are in achieving the required standards and minimizing or eliminating significant adverse environmental impacts. Review of monitoring reports required to be submitted for review to the county will be reviews on a cost-recovery basis with expenses to be paid by the owner/operator." See Land Use Finding 32.
- B-4 "Mining and processing shall take place only between 6:00 A.M. and 8:00 P.M. unless otherwise approved by the Planning Director." See Land Use Finding 33.
- B-5 "Final wetland Permit approval shall be required prior to initiation of Phase 6 in order to verify that adequate wetland mitigation has been or will be completed within 1 year of the excavation of Wetland B." See Wetland Finding 2.
- B-6 "Clark County Wetland Protection Ordinance (CCC chapter 13.36) requires wetlands and wetland buffers to be maintained in a natural state. Refer to the Conservation Covenant (Ref # \_\_\_\_ ) recorded with the Clark County Auditor for limitations on the maintenance and use of the wetland and wetland buffer areas identified on the face of this Site Plan." See Wetland Finding 3.
- B-7 "Monitoring reports for "Monitoring and Evaluation Measures" (MEM) MEM-04, MEM-05, MEM-06, MEM-07 and MEM-10 shall be submitted to Clark County Community Development for review and verification of compliance with all requisite reclamation obligations identified in Alternative B of the HCP." See Habitat Finding 4.

- B-8 "Access for the site to the county road system for all purposes shall be via Storedahl Pit Road at the intersection of NE Bennett Road and NE 61<sup>st</sup> Avenue." See Transportation Finding 3.
- B-9 "The proposed Daybreak Mine Expansion is subject to Clark County's Stormwater and Erosion Control Ordinance (CCC chapter 13.25) during mining and reclamation." See Stormwater, Groundwater, Surface Water and Erosion Control Finding 1.
- B-10 "The owner/operator of the surface mine shall repair, modify or replace groundwater wells that are shown to be adversely affected by the surface mining activity." See Stormwater, Groundwater, Surface Water and Erosion Control Finding 2.
- B-11 "No extractive mining activities shall be permitted within the 100 year floodplain, & floodway boundaries per the revised 100-year floodplain maps published by FEMA, and adopted by Clark County effective July 19, 2000." See Stormwater, Groundwater, Surface Water and Erosion Control Finding 5.
- B-12 "Building construction occurring subsequent to this application shall be in accordance with the provisions of the county's building and fire codes. Additional specific requirements may be imposed at the time of building construction as a result of the permit review and approval process." See Fire Protection Finding 2.

**C. The following conditions shall be met prior to excavation of Phase 6:**

- C-1 Final wetland Permit approval shall be required prior to initiation of Phase 6 in order to verify that adequate wetland mitigation has been or will be completed within 1 year of the excavation of Wetland B. See Wetland Finding 2.

**D. Standard Conditions that shall be met:**

- D-1 Within 5 years of the effective date of this decision, the developer shall submit to the Planning Director a fully complete final site plan consistent with this preliminary site plan approval. Otherwise, this preliminary site plan approval shall be null and void.
- D-2 The requirements of CCC 13.36.250 apply, and shall be complied with, even if no wetland impacts are proposed, including the following:
- a) Demarcation of wetland and/or buffer boundaries established prior to, and maintained during construction (*i.e.* sediment fence);
  - b) Permanent physical demarcation of the boundaries in a manner approved by the Development Services Manager, *i.e.* fencing, hedgerows, berms etc. and posting of approved signage on each lot or every 100 feet of the boundary, whichever is less;
  - c) Recording a conservation covenant with the County Auditor that runs with the land as described in Wetland Finding 3 above,
  - d) Showing the wetland and buffer boundaries on the face of the Final Site Plan and including a note that refers to the separately recorded conservation covenant.



- D-3 Prior to construction, the owner/operator shall apply for and obtain County approval of a final erosion control plan designed in accordance with CCC chapter 13.27.

**Date of Decision:** November 4, 2004.

By: \_\_\_\_\_  
Daniel Kearns,  
Land Use Hearings Examiner

### **Notice of Appeal Rights**

An appeal of any aspect of the Hearings Examiner's decision, except the SEPA determination, may be appealed to the Board of County Commissioners only by a party of record. A party of record includes the applicant and those individuals who signed the sign-in sheet or presented oral testimony at the public hearing or submitted written testimony prior to or at the public hearing on this matter.

Any appeal of the final land use decisions shall be filed with the Board of County Commissioners, 1300 Franklin Street, Vancouver, Washington, 98668 within 14 calendar days from the date the notice of final land use decision is mailed to parties of record.

Any appeal of the Land Use Hearings Examiner's final land use decision shall be in writing and contain the following:

1. The case number designated by the County and the name of the applicant;
2. The name and signature of each person or group (petitioners) and a statement showing that each petitioner is entitled to file an appeal as described under 40.510.030(H) of the Clark County Code. If multiple parties file a single petition for review, the petition shall designate one party as the contact representative with the Development Services Manager. All contact with the Development Services Manager regarding the petition, including notice, shall be with this contact person;
3. The specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error;
4. If the petitioner wants to introduce new evidence in support of the appeal, the written appeal must also explain why such evidence should be considered, based on the criteria in subsection 40.510.030(H)(3)(b); and
5. A check in the amount of \$279.00 (made payable to the Clark County Board of County Commissioners) must accompany an appeal to the Board.